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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

MAX JANIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT H. BORK,
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MAX JANIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America and Frank S. Schmidt, District Director of Internal Revenue for the District of Los Angeles, California, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The findings of fact, conclusions of law and order of the district court (App. A, *infra*) are not officially reported. The memorandum of affirmance of the court of appeals (App. B, *infra*) is not officially reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*) was entered July 22, 1974. A petition for rehearing was denied on September 5, 1974 (App. D, *infra*). By

order dated November 27, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including February 2, 1975 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal civil tax assessment is invalid when the Internal Revenue Service's knowledge of the taxpayer's liability and its computation of the amount due are based upon evidence seized by local law enforcement officers pursuant to a defective search warrant.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

On November 26, 1968, the Los Angeles Police Department obtained a warrant directing a search for bookmaking paraphernalia on the persons of respondent and of Morris Levine, and at certain specified locations. The warrant was issued by a judge of the Municipal Court of the Los Angeles Judicial District and was based upon the affidavit of a police officer that he had received information from a confidential and reliable informant that respondent and Levine were engaged in taking bets on certain telephone numbers

(App. A, *infra*, p. 3A; Pltf. Exs. 1, 2; I-R. 111–117).[1]

In the ensuing search, conducted pursuant to the warrant by Los Angeles police officers on November 30, 1968, respondent and Levine were arrested and certain property was seized. The seized property included $4,940 in cash and wagering records that belonged to respondent. Shortly thereafter, the Los Angeles police officers who had prepared the affidavit in support of the search warrant notified a revenue agent of the Internal Revenue Service that respondent had been arrested for bookmaking activity. Together with a Los Angeles police officer, the revenue agent analyzed the wagering records obtained pursuant to the search warrant and determined the gross volume of respondent's gambling enterprise for the five days immediately preceding his arrest. The Los Angeles police officer further informed the revenue agent that he had conducted a surveillance of respondent's activities for the 77-day period from September 14, 1968, through November 30, 1968, the day of respondent's arrest (App. A, *infra*, pp. 3A–5A).

Respondent had not filed any federal or state tax returns pertaining to his bookmaking activities for the period from September 14, 1968, through November 30, 1968. Based upon an examination of the evidence obtained by the Los Angeles police, the Internal Revenue Service made an assessment for civil wagering taxes imposed by Section 4401 of the Internal Revenue Code of 1954 against respondent in the amount of $89,026.09 plus $123.97 of interest.

[1] "Exs." and "R." references are to the exhibits and to the three-volume record filed in the court of appeals, respectively.

The amount of the assessment was computed by determining respondent's daily gross proceeds for the five-day period covered by the wagering records analyzed by the revenue agent and multiplying the resulting figure by 77, the period of the police surveillance of respondent's activities. Pursuant to this assessment, the Internal Revenue Service levied upon the $4,940 in cash that had been seized by the Los Angeles police, in partial satisfaction of respondent's tax liability (App. A, *infra*, pp. 5A–6A).

Respondent and Levine were prosecuted for violation of local gambling laws. On February 18, 1969, they moved to quash the search warrant before the same Municipal Court judge who had issued the warrant. They urged that the affidavit in support of the warrant did not set forth in sufficient detail the reliability of the information supplied by the confidential informant, so that the issuing magistrate was unable to judge independently the reliability of the information. The motion was granted, and the court ordered that all items taken pursuant to the search warrant be returned to respondent and Levine, except the cash taken by the Internal Revenue Service (App. A, *infra*, pp. 3A–4A).

On December 9, 1970, respondent commenced this refund suit in the United States District Court for the Central District of California, seeking a refund of the $4,940 levied upon by the Internal Revenue Service in partial satisfaction of the $89,026.09 assessment (I–R. 28–31). In response, the government filed a counterclaim against respondent in the amount of $84,210.06, seeking to reduce to judgment the unpaid portion of the assessment (I–R. 48–51).

At the outset of a hearing, the district court noted that it was "reluctantly holding that the affidavit supporting the search warrant [was] insufficient under the *Spinelli* [*Spinelli* v. *United States*, 393 U.S. 410] and *Aguilar* [*Aguilar* v. *Texas*, 378 U.S. 108] doctrines" (III–R. 3). The district court thereupon found that all of the evidence underlying the tax assessment was "obtained directly or indirectly as a result of the search pursuant to the defective search warrant * * *," so that such evidence was obtained "in violation of [respondent's] Fourth Amendment rights to be free from unreasonable searches and seizures" (App. A, *infra*, p. 7A).

The district court thereupon upheld respondent's refund claim and dismissed the government's counterclaim with prejudice, stating that "substantially all, if not all" of the evidence utilized by the Internal Revenue Service in making its assessment was illegally obtained, "and, as such, the assessment was invalid." In the district court's view, once it concluded that the assessment was based upon illegally obtained evidence, respondent "[was] not required to prove the extent of the refund to which he claims he is entitled" (App. A, *infra*, p. 7A). The court of appeals affirmed on the basis of the district court's findings of fact and conclusions of law (App. B, *infra*, p. 12A).

REASONS FOR GRANTING THE WRIT

In holding that a federal civil tax assessment is invalid because it was based upon evidence obtained by local law enforcement officers pursuant to a defective search warrant, the decision below, upholding respondent's claimed refund on that ground, creates a conflict among the circuits that should be resolved by

this Court. Moreover, the invalidation of a civil tax assessment in these circumstances represents a drastic and unwarranted extension to civil proceedings of the Fourth Amendment exclusionary rule, which this Court has thus far applied to bar the use of illegally obtained evidence in criminal proceedings. Thus, this case raises a question of the utmost importance concerning the scope of the exclusionary rule as a deterrent to effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures and as an impediment to the enforcement of civil claims.

1. The decision below directly conflicts with *Compton* v. *United States*, 334 F. 2d 212 (C.A. 4). There, on essentially parallel facts, the Fourth Circuit held that a civil wagering tax assessment is not invalid despite the fact that it was based almost entirely upon evidence obtained in an illegal search conducted by local police officers, the fruits of which were made available to agents of the Internal Revenue Service. As in this case, the illegality of the search in *Compton* arose on account of a defect in the warrant. But, contrary to the decision of the courts below, the Fourth Circuit rejected the taxpayer's refund claim, observing that the fact that the assessment was premised upon the fruits of an illegal search was "not decisive of the issues here" (334 F. 2d at 215–216).

In upholding respondent's refund claim on the ground that the Service's assessment was based upon illegally seized evidence, the district court concluded that respondent "[was] not required to prove the extent of the refund to which he claims he is entitled" (App. A, *infra*, p. 7A). In so holding, the court refused to follow the longstanding rule established by

decisions of this Court, to which the Fourth Circuit adhered in *Compton*, that in a refund suit the taxpayer bears the burden of proving the exact amount that he is entitled to recover. See, *e.g.*, *Botany Mills* v. *United States*, 278 U.S. 282, 289–290; *Reinecke* v. *Spalding*, 280 U.S. 227, 232–233; *Lewis* v. *Reynolds*, 284 U.S. 281; see also *Stone* v. *White*, 301 U.S. 532. As those decisions make clear, the reason for this rule is that a suit for refund of taxes paid is analogous to an equitable action for money had and received. The taxpayer's entire liability is at issue, and he cannot prevail if the government is entitled to retain the amount claimed under any theory.

Thus, it is not enough for the taxpayer to show, as we concede respondent has done here, that the assessment was based upon the fruits of an illegal search. In order to recover, he must introduce evidence showing his correct liability and that he has in fact overpaid his taxes by the amount claimed. Indeed, in rejecting the claimed refund in *Compton*, where the taxpayer, like respondent, did nothing more than establish that the assessment was based upon illegally seized evidence, the Fourth Circuit stated, in terms particularly appropriate to the decision below: "The difficulty with plaintiff's position is that she apparently misconceives the burden of proof imposed upon her and which she must sustain in order to establish her claim of entitlement to a refund" (334 F. 2d at 216).[2]

[2] The same considerations apply to the government's counterclaim, which was erroneously dismissed by the courts below. When the government counterclaims in a tax refund suit, it presents the certificate of assessment, which is presumed to be correct and is sufficient to meet the government's initial burden of coming forward. Thereupon, the taxpayer has the burden

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2. The radical departure from the requirements of proof in tax refund suits by the decision below appears to have been predicated upon an extension of the Fourth Amendment exclusionary rule first enunciated by this Court in *Weeks* v. *United States,* 232 U.S. 383. Under that rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. See also *Mapp* v. *Ohio,* 367 U.S. 643. In holding that the assessment "must be suppressed and quashed as being violative of the plaintiff's Fourth Amendment rights to be free from unreasonable search and seizure" (App. A, *infra,* p. 8A), the district court apparently concluded that collection of the tax due under the assessment would abridge respondent's constitutional rights.

As the Court explained in *Elkins* v. *United States,* 364 U.S. 206, 217, the purpose of the exclusionary rule is to deter unlawful police conduct. But whatever the extent to which the exclusionary rule may arguably accomplish its deterrent objective in criminal cases,[3] the Court has never extended the exclusionary rule

of proving that the assessment is incorrect and that he owes no additional tax. See, *e.g., Lucas* v. *Structural Steel Co.,* 281 U.S. 264, 271; *Wickwire* v. *Reinecke,* 275 U.S. 101, 105; *Welch* v. *Helvering,* 290 U.S. 111, 115; *United States* v. *Rexach,* 482 F. 2d 10, 15–17 (C.A. 1), certiorari denied, 414 U.S. 1039, and cases cited therein.

[3] The practical effect of the rule upon unlawful police behavior has been broadly disputed. See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 424–427 (appendix to dissenting opinion of Chief Justice Burger).

to civil cases. Thus, for example, in *Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693, where the rule was invoked to exclude illegally obtained evidence in a forfeiture proceeding, the Court was careful to note that "a forfeiture proceeding is quasi-criminal in character" because "[i]ts object, like a criminal proceeding, is to penalize for the commission of an offense against the law" (380 U.S. at 700). See also *Cleary* v. *Bolger,* 371 U.S. 392, 403 (concurring opinion of Mr. Justice Goldberg).

In extending the application of the exclusionary principle to a civil case, the decision below runs counter to the analytical framework adopted by this Court only last Term in *United States* v. *Calandra,* 414 U.S. 338.[4] There, this Court declined to apply the exclusionary rule to grand jury proceedings, concluding that the potential injury to the function of the grand jury far outweighed any benefit to be derived from an application of the rule in that context. In so holding, the Court noted that the broad dictum of *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392—that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all"—had

[4] Strictly speaking, this case does not involve an application of the conventional exclusionary rule, which comes into play only at the time illegally seized evidence is sought to be introduced at trial. The district court here utilized, and the court of appeals approved, a much more radical sanction—summary judgment against the government because its cause of action was deemed tainted.

been "substantially undermined by later cases" (414 U.S. at 352–353, n. 8).[5]

Employing the *Calandra* analysis and balancing the potential harm resulting from exclusion against the benefit to Fourth Amendment values of applying the exclusionary principle, it becomes plain that it was improper to resolve this litigation in respondent's favor. The effect of the application of the rule in this case would be to foreclose for all practical purposes respondent's payment of a tax for which he would otherwise be liable. Given the widespread uncertainty over the utility of the exclusionary rule, the sanction of defeating the collection of the revenues should be imposed, if ever, only when it is beyond question that such an extension of the rule would further its broad rationale of deterrence. As a general proposition, the extension of the exclusionary rule to invalidate a tax assessment that is purely civil in character would seem to be unrelated to the goal of preventing future unlawful police conduct. As the Court stated in *Calandra*: "[T]he need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a *criminal sanction* on the victim of the search" (414 U.S. at 348; emphasis supplied).

Indeed, the inapplicability of the deterrence theory is especially evident here, since it is wholly unrealistic

[5] In applying the exclusionary rule in civil cases, the lower courts have heavily relied upon the *Silverthorne* dictum. See, *e.g.*, *Pizzarello* v. *United States*, 408 F. 2d 579, 585 (C.A. 2); *Suarez* v. *Commissioner*, 58 T.C. 792, 802.

to assume that local police officers would be deterred from illegal searches and seizures because a possible federal civil tax liability might be rendered uncollectable. The connection between the illegal search conducted by the Los Angeles police and the civil federal tax assessment made against respondent is so indirect and attenuated that reliance upon the deterrence rationale would at best involve hazardous speculation. Compare *Elkins* v. *United States,* 364 U.S. 206, 211–214, and cases cited therein.

Finally, extension of the exclusionary principle is particulary unwarranted in the context of this case, where the illegality of the search derived from a defect in a search warrant issued by a judge. As the Court recently stated in *Michigan* v. *Tucker,* 417 U.S. 433, 447: "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." However, where the official action is taken in complete good faith, the Court indicated that "the deterrence rationale loses much of its force" (*ibid.*).[6] Under these circumstances, the use of the exclusionary principle to punish the federal tax collector for local police conduct calls for review by this Court.

[6] There can be little doubt that the actions of the Los Angeles police in this case were done in good faith. Indeed, the difficulty of applying the rule of *Spinelli* v. *United States*, 393 U.S. 410, the basis on which the search warrant against respondent was held to be defective, is amply illustrated by the proliferation of views in *United States* v. *Harris*, 403 U.S. 573, which was accompanied by five separate opinions.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
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FEBRUARY 1975.

APPENDIX A

[Filed: February 27, 1973; Clerk, U.S. District Court, Central District of California by Deputy]

United States District Court, Central District of California

No. 70-1383-MML

MAX JANIS, PLAINTIFF
v.
UNITED STATES OF AMERICA, AND FRANK S. SCHMIDT, DISTRICT DIRECTOR OF INTERNAL REVENUE, DEFENDANTS

Findings of Fact and Conclusions of Law

Sherman and Sturman, 8500 Wilshire Boulevard, Suite 908, Beverly Hills, Calif. 90211, (213) 655-8862. Attorneys for Plaintiff Max Janis.

The above-entitled cause came on regularly for hearing on the plaintiff's motions and trial on February 13, 1973, before the Honorable Malcolm M. Lucas, United States District Judge; Sherman and Sturman, by Richard G. Sherman, Esq. and Herbert D. Sturman, Esq., appearing as counsel for plaintiff, and William D. Keller, United States Attorney for the Central District of California, Charles H. Magnuson, Assistant United States Attorney, Chief, Tax Division, and Mason C. Lewis, Assistant United States Attorney, appearing as counsel for the defendants; the Court having considered all of the pleadings and files in this matter, the plaintiff's motions with annexed exhibits and the defendant's responses thereto, the stipulated facts in the Pre Trial Conference

Order, the arguments of counsel, and being fully advised in the premises, makes the following findings of fact:

1. This is an action for the refund of internal revenue taxes. The plaintiff herein is one Max Janis; the defendants herein are Frank S. Schmidt, District Director of Internal Revenue, and the United States of America, a sovereign body politic. The plaintiff seeks the recovery of $4,940.00, together with interest thereon as provided by law. The defendants have counterclaimed for the recovery of taxes allegedly due and owing from the plaintiff to the defendants in the net sum of $84,210.06, together with interest thereon as provided by law. The pleadings which raise the issues are as follows:

A. Amended Complaint for Refund of Taxes.

B. Amended Answer and Counterclaim.

2. Federal jurisdiction and venue are invoked upon the following grounds:

A. Plaintiff is a citizen of the United States and resides in the County of Los Angeles in the Central District of California.

B. Defendant, Frank S. Schmidt, is, and at all times relevant hereto was, the District Director of Internal Revenue for the Los Angeles District of California.

C. The defendant, United States of America, is a sovereign body politic.

D. The Court has jurisdiction and venue of this action for refund of internal revenue taxes pursuant to 26 U.S.C. Section 7422, 28 U.S.C. Sections 1346(a)(1), 1391(b) and 1402(a)(1), and the internal revenue laws of the United States.

E. The Court has jurisdiction of the counterclaim hereof pursuant to 28 U.S.C. Sections 1340 and 1346(c).

3. On December 5, 1968, defendants by and through their agents, assessed an excise tax deficiency against plaintiff in the sum of $89,026.09, plus interest in the sum of $123.97.

4. The items upon which the defendants based their assessment against plaintiff were originally obtained by officers of the Los Angeles Police Department pursuant to Search Warrant 1878, issued on November 26, 1968, by the Honorable Xenophon F. Lang, Judge of the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. Said search warrant was issued by Judge Lang on the basis of an affidavit in support of said search warrant, executed by one Leonard Weissman, a Los Angeles Police Officer attached to the Administrative Vice Division.

5. The aforementioned search warrant, in turn, was acted upon by the Los Angeles Police Department on November 30, 1968, at which time the plaintiff and one Morris Aaron Levine were arrested and the premises in which the plaintiff and Mr. Levine were found were searched.

6. At the time of the arrests and search, to wit, on November 30, 1968, certain property of the plaintiff and the said Morris Aaron Levine was seized by the Los Angeles police officers. Included within the seized property was cash in the sum of $4,940.00, which such cash constituted the property of the plaintiff. In addition thereto, certain betting markers and other documents were seized.

7. Following the arrests of the plaintiff and Mr. Levine as aforesaid, a prosecution was instituted in the Municipal Court of the Los Angeles Judicial

District of the State of California, bearing Case No. A 239 336, and entitled *People of the State of California, Plaintiff* v. *Max Janis and Morris Aaron Levine, Defendants.* On February 18, 1969, the plaintiff herein and Morris Aaron Levine moved to quash the aforementioned search warrant before the Honorable Xenophon F. Lang, Municipal Court Judge who was the same magistrate who had originally issued said warrant. The motion to quash the search warrant was granted by Judge Lang on the grounds that the affidavit in support thereof failed to set forth the underlying circumstances necessary to enable the issuing magistrate to independently judge the validity and reliability of the informant's information. Judge Lang further ordered that all items seized pursuant to the said search warrant be returned to the plaintiff herein and Morris Aaron Levine, save and except Judge Lang did not order the return of the cash in the sum of $4,940.00, which had been seized by the defendants on December 5, 1968.

8. The defendants predicated their assessment of an excise tax deficiency against plaintiff herein in the sum of $89,026.09, plus interest of $123.97, solely upon items which had been seized by the Los Angeles Police Department pursuant to the aforementioned search warrant and upon conversations had with representatives of the Los Angeles Police Department relating to the contents of the items seized pursuant to the search warrant and the duration of plaintiff's alleged wagering activities.

9. On December 3, 1968, Leonard Weissman, a Los Angeles Police Officer, informed Morris Nimovitz, a revenue officer of the Internal Revenue Service, that the plaintiff herein had been arrested for alleged bookmaking activities. Officer Weissman was the same person who had prepared the affidavit in support of

the search warrant which had been quashed by Judge Lang on the basis of an insufficient affidavit in support thereof. Mr. Nimovitz proceeded to the Los Angeles Police Department and with the help of Officer Weissman, analyzed certain betting markers and information which had been seized pursuant to the aforementioned search warrant. On the basis of their analysis, the gross volume of bookmaking activities alleged to have been conducted by the plaintiff herein and Morris Aaron Levine was determined for the five days immediately preceding the arrest of the plaintiff herein and Morris Aaron Levine. Officer Weissman further informed Mr. Nimovitz that he had commenced his investigation of the plaintiff herein on September 14, 1968, which continued on an intermittent basis through November 30, 1968, the date of the arrest. On the basis of the information given by Officer Weissman to Mr. Nimovitz, the civil tax assessment was made by taking five days of activities as determined from the items seized pursuant to the aforementioned search warrant and multiplying the daily gross volume times 77 days, to wit, the period of Officer Weissman's intermittent surveillance (September 14, 1968 through November 30, 1968).

10. The sole basis of the computation of the civil tax assessment against the plaintiff herein was, therefore, the items obtained pursuant to the search warrant (five days of receipts and currency in the amount of $4,940.00) and the information furnished to Mr. Nimovitz by Officer Weissman with respect to the duration of plaintiff's alleged wagering activities.

11. The plaintiff has not filed any tax returns with either the Internal Revenue Service or the Franchise Tax Board of the State of California pertaining to his alleged bookmaking activities for the period of September 14, 1968 through November 30, 1968.

12. The plaintiff herein seeks a refund in the sum of $4,940.00, together with interest thereon as provided by law. Said $4,940.00 constituted the property of the plaintiff which was levied upon and seized by the defendants herein on December 5, 1968. The defendants, in turn, have filed a counterclaim against the plaintiff seeking to reduce to judgment the unpaid portion of its assessment against plaintiff, together with interest thereon. The amount of said unpaid portion is $84,210.06, which such amount is arrived at by deducting the sum of $4,940.00, i.e., the amount seized and levied upon by the Internal Revenue Service on December 5, 1968, from the assessment of $89,150.06.

13. The plaintiff's duly filed motions for suppression of evidence, to quash the assessment, and to shift the burden of proof to the defendant United States. For the reasons which follow hereafter said motions must be granted.

14. Independent examination of the affidavit which was the basis of the search warrant that Judge Lang had quashed reveals that said affidavit does not detail any of the "underlying circumstances" upon which the informants' conclusions were based. The affidavit in question is strikingly similar to the affidavit held to be defective in *Spinelli* v. *United States,* 393 U.S. 410 (1969). Said affidavit does not detail any of the "underlying circumstances" upon which the informants' conclusions were based; nor are there any allegations that the informants personally observed any conduct on the part of Janis or Levine, illegal or otherwise; as such, there was no probable cause for the issuance of said search warrant for the reasons expressed by the Supreme Court in *Spinelli* at 393 U.S. 418.

15. All of the evidence utilized as the basis of

defendants' assessment against plaintiff was obtained directly or indirectly as a result of the search pursuant to the defective search warrant as aforesaid. Consequently, the defendants' assessment against plaintiff was based in substantial part, if not completely, on illegally procured evidence, which such evidence was seized and obtained in violation of plaintiff's Fourth Amendment rights to be free from unreasonable searches and seizures.

And from the foregoing findings of fact, the Court concludes as follows:

1. This Court has jurisdiction over the subject matter and the parties hereto.

2. Plaintiff is entitled to a refund of $4,940.00, together with interest thereon, as prayed for in the Complaint for the reason that substantially all, if not all, of the evidence utilized by the defendants herein in making their assessment in the sum of $89,026.09 against plaintiff was illegally obtained, and, as such, the assessment was invalid.

3. Where, as in this case, illegally obtained evidence constitutes the basis of a federal tax assessment, plaintiff is not required to prove the extent of the refund to which he claims he is entitled. It is sufficient that plaintiff prove that substantially all, if not all, of the evidence upon which the assessment was based was the result of illegally obtained evidence.

4. The defendants' counterclaim should be dismissed with prejudice as said counterclaim seeks to reduce to judgment a federal tax assessment which was based substantially all, if not all, upon illegally obtained evidence.

5. Plaintiff is entitled to judgment on his complaint in the sum of $4,940.00, together with interest thereon as provided by law, and defendants shall take nothing on their counterclaim.

6. The civil excise tax assessment in the sum of $89,026.09 against Max Janis was based substantially *upon evidence illegally* obtained from the above described search and seizure; and, as a consequence thereof, such assessment, although civil in nature, is invalid and must be suppressed and quashed as being violative of the plaintiff's Fourth Amendment rights to be free from unreasonable search and seizure.

7. The information upon which the assessment was made did not come from any source independent of the illegal search and seizure and the rule of *United States* v. *Bacall,* 443 F. 2d 1050 (9th Cir. 1971), is not applicable to the facts of this case.

8. Where findings of fact and conclusions of law hereunder constitute mixed questions of law and fact, they shall be deemed to constitute a finding of fact and/or a conclusion of law, as the case may be.

(S) Malcolm M. Lucas,
MALCOLM M. LUCAS,
U.S. District Judge.

Dated: FEBRUARY 27, 1973.

[Filed: February 27, 1973; Clerk, U.S. District Court, Central District of California by Deputy]

[Entered: February 27, 1973; Clerk, U.S. District Court, Central District of California by Deputy]

United States District Court Central District of California

No. 70–1383–MML

MAX JANIS, PLAINTIFF

v.

UNITED STATES OF AMERICA, AND FRANK S. SCHMIDT, DISTRICT DIRECTOR OF INTERNAL REVENUE, DEFENDANTS

ORDER

Sherman and Sturman, 8500 Wilshire Boulevard, Suite 908, Beverly Hills, Calif. 90211, (213) 655–8862. Attorneys for Plaintiff, Max Janis.

The above-entitled cause came on regularly for hearing on the plaintiff's motions and trail on February 13, 1973, before the Honorable Malcolm M. Lucas, United States District Judge; Sherman and Sturman, Esq., appearing as counsel for plaintiff, and William D. Keller, United States Attorney for the Central District of California, Charles H. Magnuson, Assistant United States Attorney, appearing as counsel for the defendants; the Court having considered all of the pleadings and files in this matter, the plaintiff's motions with annexed exhibits and the defendant's responses thereto, the stipulated facts in the Pre Trial Conference Order; the arguments of counsel, and hav-

ing entered its Findings of Fact and Conclusions of Law, orders that:

1. The items listed below be suppressed as evidence in this and any future criminal and civil proceedings and returned to the plaintiff herein:

a) All items of personal property or copies thereof, including but not limited to written, printed, typed documents, notations, books, notebooks, magazines, records, cards, and miscellaneous papers, together with all other items of physical evidence seized from plaintiff on November 30, 1968, and from plaintiff's apartment at 1155 North LaCienega, Apartment 904, Los Angeles, California, by officers of the Los Angeles Police Department pursuant to search warrant 1878, issued on November 26, 1968, by the Honorable Xenophon Lang, Judge of the Municipal Court, Los Angeles Judicial District, State of California.

b) All statements, admissions, and confessions of the plaintiff made by him on November 30, 1968.

c) Any and all fruits of the above described arrest and search and all evidence obtained as a direct or indirect result of said arrest and search.

d) All monies and properties seized from the plaintiff as a result of the civil tax assessment based upon said arrest and search.

2. The civil tax assessment made by the Internal Revenue Service on December 5, 1968, in the amount of $89,026.09 against all the property and assets of the plaintiff Max Janis be quashed on the ground that said assessment is the product of illegally obtained evidence.

3. Plaintiff shall have judgment on his complaint in the sum of $4,940.00, together with interest thereon as provided by law, and defendants' shall take nothing on their counterclaim.

4. The defendants' counterclaim should be dismissed with prejudice as said counterclaim seeks to reduce to judgment a federal tax assessment which was based substantially all, if not all, upon illegally obtained evidence.

FEBRUARY 27, 1973.

(S) Malcolm M. Lucas,
MALCOLM M. LUCAS,
United States District Judge.

APPENDIX B

United States Court of Appeals
for the Ninth Circuit

(No. 73–2226)

MAX JANIS, APPELLEE

v.

UNITED STATES OF AMERICA, AND FRANK SCHMIDT, ETC., APPELLANTS

Memorandum of Affirmance

[July 22, 1974]

Appeal from the United States District Court
for the Central District of California

Before ELY and HUFSTEDLER, Circuit Judges, and TURRENTINE, District Judge*

Upon the basis of the District Court's very carefully written Findings of Fact and Conclusions of Law, the judgment of the District Court is

Affirmed.

---

* Honorable Howard B. Turrentine, United States District Judge, San Diego, California, sitting by designation.

APPENDIX C

United States Court of Appeals for the Ninth Circuit

(No. 73–2226, DC 70–1383)

MAX JANIS, APPELLEE

v.

UNITED STATES OF AMERICA, AND FRANK SCHMIDT, ETC., APPELLANTS

Judgment

Appeal from the United States District Court for the Central District of California.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

A true copy.

Attest: January 10, 1975.

EMIL E. MELFI, JR.,
Clerk.

By RAY HEWITT,
Senior Deputy.

Filed and entered July 22, 1974.

APPENDIX D

[Filed: September 5, 1974, Emil E. Melfi, Jr., Clerk, U.S. Court of Appeals]

United States Court of Appeals for the Ninth Circuit

No. 73-2226

MAX JANIS, APPELLEE

v.

UNITED STATES OF AMERICA, AND FRANK SCHMIDT, ETC., APPELLANTS

Order

ON PETITION FOR REHEARING

Before ELY and HUFSTEDLER, Circuit Judges, and TURRENTINE, District Judge.*

The Petition for Rehearing is Denied.

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* Honorable Howard B. Turrentine, United States District Judge, San Diego, California, sitting by designation.

U.S. GOVERNMENT PRINTING OFFICE: 1975

Supreme Court, U. S.
FILED
JUL 25 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-958

UNITED STATES OF AMERICA, ET AL.,
Petitioners

—v.—

MAX JANIS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED FEBRUARY 3, 1975
CERTIORARI GRANTED JUNE 9, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-958

UNITED STATES OF AMERICA, ET AL.,
Petitioners

—v.—

MAX JANIS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

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RELEVANT DOCKET ENTRIES

CIVIL DOCKET
UNITED STATES DISTRICT COURT

70-1383-MML

DATE	PROCEEDINGS
6/23/70	Fld Complt to enjoin collection of Taxes under Arbitrary and Illegal Assessment and for Return of Property. Issd summs—Md JS-5.
7/14/70	Fld summs—retd svd.
8/26/70	Fld stip & ord (EC) extendg time that the deft w/i which to file an ans or otherwise plf to & includg 10/28/70.
10/26/70	Fld Defts U.S.A. note of motn & motn to dismiss plf's complt & memo retable 12/7/70, 9:30 A.M.
11/20/70	Fld plf's oppos to motn to dismiss.
12/7/70	Cnsl pre & argue deft's mot to dismiss & ct ords mot grant w/O prej. Cnsl for deft to prepare form ord & ct states that plf may file an amended compl.
12/9/70	Fld Pltf's FIRST AMENDED COMPLAINT. Fld order dismissing plt's orig cmplt w/o prej. (Ent 12/10/70)
12/29/70	Fld stip & ord (EC) extendg time for deft to & includg 2/18/71, w/i which to answer of otherwise plead.
2/18/71	Fld U.S.A. ANSWER.
2/19/71	Fld & Mld notice setting for Pre Trial Con, 4/26/71, 9:30 A.M.
3/31/71	Fld deft's written interrogs to plft pursuant to rule 33.

DATE	PROCEEDINGS

4/1/71 Fld USA not of mot & mot for leave of Court to amend ans, retable 4/26/71, 9:30 am & affid of Mason C. Lewis.

4/20/71 Fld stip & ord (EC) cont P/T conf retable 6/14/71, at 9:30 am.

4/26/71 Fld stip & ord (EC) permitting deft to amend its ans & to take deft's mot for leave to amend off cal.

4/29/71 Fld U.S.A. Amended ANSWER & counterclaim.

4/30/71 Fld ans of plft, Max Janis, to written interrogs served upon him by deft's pursuant to rule 33(B), F.R.C.P.

5/18/71 Fld plf'ts REPLY to counterclaim.

5/19/71 Fld plft request for admissions & written interrogs.

5/21/71 Fld U.S.A. not of mot retable 6/7/71, at 9:30 AM & mot for ord to compel discovery or, int the alternative, for an ord dismissing pltf's Amended complt & entering judgmt for deft on its counterclaim, & memo.

6/1/71 Fld stip & ord (EC) for contg of hrg on mot to compel discovery retable 9/27/71, at 9:30 AM; Fld stip & ord (EC) for contg of P/T conf retable 10/18/71, at 9:30 AM.

6/10/71 Fld deft's ans to request for admissions & written interrogs.

8/6/71 Fld ord trans to Cal MML for all ?————————?

9/14/71 Fld plft's memo of pts & auths in oppos to mot to compel discovery or, in the alternative, for an ord dismissing plft's amended complt & entering judgmt for deft on its counterclaim.

DATE	PROCEEDINGS

9/21/71 Fld plft not of mot retable 10/4/71, at 9:30 AM, & mot for ord to compel discovery or, in the alternative, for an ord dismissing deft's counterclaim & entering judgmt for plft on his complt, & memo; Fld stip & ord (MML) shortening time for plft to file not retable 10/4/71, at 9:30 AM.

9/24/71 Fld response of U.S.A. to plft's mot for ord to compel discovery or, in the alternative, for an ord dismissing deft's counterclaim & entering judgmt for plft on his complt & memo; Fld reply of United States of America to plft's memo of pts & auths in oppos to mot to compel discovery, etc.

10/4/71 Hearing: Motion by plft to compel discovery Granted. Motion by plft to dismiss defts counterclaim Denied. Motion by deft for an order to compel discovery or in alternative to dismiss Denied. Pre-Trial ordered continued to Dec 13, 1971 at 10 am. Pltf to prepare formal order. (MML)

10/19/71 Fld deft's amended ans to request for admissions & written interrogs.

10/22/71 LODGED proposed ord.

10/26/71 Fld order granting pltf's mot to compel discovery, dnyg pltf's mot for order dismissing deft's cntrclm & entering judgmnt, dnyg deft's mot for ord to compel discovery, etc dnyg deft's mot for ord dismissing pltf's amnd cmplt. (Ent 10/27/71 ntfd prtys)

10/28/71 Fld plft request for admissions & written interrogs.

12/2/71 Fld deft's ans to request for admissions and written interrogs.

12/9/71 Fld stip & ord (MML) retable 1/22/72, 9:30 am for contc of P/T conf.

DATE	PROCEEDINGS
1972	
1/27/72	Fld plft not of mot retable 2/14/72, 9:30 AM, & mot for summy judgmt affid of Herbert D. Sturman, & memo in support thereof; LODGED proposed plft findgs of fact & conclus of law.
2/2/72	Fld stip & ord (MML) for tak P/T procedures off calendar & for contg of hrg on plft's mot for summary judgmt retble 3/20/72, 9:30 AM.
3/10/72	Fld deft's respons to pltf's mot for summy judgmt, affid of Mason C. Lewis, & memo.
3/23/72	Fld stip & ord (MML) for contd of hrg on plft's mot for summy judgmt retable 4/10/72, 10 am; Fld ex parte mot of U.S.A. for substitution of page in deft's response to plft's mot for summy judgmt (MML).
3/27/72	Fld plft's reply memo in support of mot for summy judgmt.
4/10/72	Motion for Summary Judgment by plaintiff denied Court and counsel confer. On motion of counsel. Pre-Trial ordered continued to June 12, 1972 at 10 am (MML).
5/10/72	Fld stip & ord (MML) for contd of P/T conf retable 7/17/72, 10 am.
5/11/72	Fld plft not of tak depos of Morris Nimovitz on 6/29/72 w/service thereon; Fld plft not of tak depos of Leonard Weissman on 6/29/72, w/service thereon; Fld plft not of tak depos of Sergeant M. Briggs on 6/29/72, w/service thereon; Fld plft not of tak depos of Sergeant A. Vincent on 6/29/72, w/service thereon.
5/18/72	Fld prae letter form re Issd (4) depos subp, as to Leonard, Weissman, Briggs, Vincent & Morris Nimovitz.
6/13/72	Fld plf's not of taking depos of Leonard Weissman on 7/10/72, w/service thereon.

DATE	PROCEEDINGS
7/7/72	Fld stip & ord (MML) for contd of P/T conf retable 8/21/72.
7/31/72	Fld deft's not of rkg depo of morris Nimovitz w/service thereon. Fld DEPOSITION of Morris Nimovitz taken on 6/29/72.
8/11/72	Fld deft's not of filing depo of Leonard Weissman: Fld DEPOSITION of Leonard Weissman, taken on 7/13/72.
8/16/72	LODGED plf's proposed PTC ord; Fld plf's memo of contntns of fact & law; Fld defts' USA P/T memo of cntntns of fact & law.
8/21/72	Pre-trial conf had. Crt ords matter cont to 10/10/72, 9:30 am for Crt trial (MML).
8/24/72	Fld pltf's supple memo of contentions of fact & law.
9/11/72	Fld PTC ord (MML).
9/20/72	Fld pltf's not of motn retable 10/10/72 at 9:30 am & motns for (1) Suppression & retrn of Evidence (2) to Quash Assessments (3) to shift Burden of proof.
9/27/72	Fld defts response to plf's mot: 1) for supression & retn of evidence, 2) to quash assessment, & 3) to shift burden of proof.
10/10/72	Fld pltf's spplmntn affdvt & memo of Pts & authors in spprt of mtned for spprssn & rtrn of evdnc to Quash Assmnt, & to Shift Burden of Proof.
10/11/72	Fld stp & ord (MML) for cont of trial date to 11/28/72, 1:30 pm.
*10/10/72	Motion by pltf: For Suppression of evidence; to quash assessment; and to shift burden of proof. Counsel Submit matter to Court on Briefs heretofore filed. Court takes matter under submission. (MML), KH

DATE	PROCEEDINGS

11/22/72 Fld stip & ord (MML) for cont of trial date to 1/16/73, 9:30 am.

12/15/72 Fld pltf's second suppltmtl memo of pts and auth in support of mtns for suppression and return of evidence, to quash assessment, and to shift burden of proof.

12/26/72 Fld defts' response to 2nd suplmntl memo of pts & auths in support of mots for suppression & rtn of evidence, to quash assessment & to shift burden of proof.

1973

1/16/73 Fld stip & ord (MML) for cont of trial date to 2/13/73, 9:30 am. eam.

1/19/73 Fld deft USA's fur response to 2nd suplmntl memo of pts & auths in support of mots for suppression & retn of evidence, to quash assessment & to shift burden of proof.

1/16/73 ENT PROCS: Cnsl for deft pres & mvs ct for cont to 2/13/73 at 9:30 am. Mtn is granted. (MML)

2/13/73 Ent Procs; Court Trial; Mrkd exhbts, argmnt hrd. Ct. finds in favor of plf. Cnsl for plf to prpr papers & ldg w/ct by 2/20/73. (MML)s Fld list of Wnnss & exhbts.

2/21/73 LODGED plf proposed findgs of fact & conclusns of law. LODGED: Proposed Ord.

2/22/73 Fld deft's objections to form of findgs of fact and concld of law.

2/26/73 LODGED pltfs propos findgs of fact and concls of law.

2/27/73 Placed in file prev. LODGED pltfs propos findgs of fact and concls of law not used.

DATE	PROCEEDINGS

2/27/73 Fld fndgs of fact & concl of law; Fld ord suppressing evidence of personal property, etc. seized frm pltf & any & all fruits of the arrest & search. The civil tax assessment md by the IRS in the amount of $89,026.09 property & assets of pltf be quashed. Pltf shall by jdgmt on his complt in the sum of $4,940.00 together with int & deft shall take nothing on their counterclaim & sd counterclaim be dismd w/prej. (Ent 2/27/73) ntfd prtys

3/9/73 Fld USA's notc of mot 7 mot to amend fdngs of fact & conclus of law & for a new trial retrnble 3/26/73, 10 am, memo.

3/14/73 Fld pltf Max Janis's response of pltf to govt's mtn to amend findgs of fact and concls of law and for new trial.

3/28/73 Lodged pltf's proposed ruling on deft's mot for new trial. Lodged pltf's prpos order grantg prelim inj.

3/26/73 ENT PROCS: Hrgng deft's mtn to amnd finds of facts & conclsns of law for a new trial. The mtn is denied. (MML)

4/3/73 Fld rulng on deft's mtn for new trial. The mtn is denied. (MML)

5/25/73 Fld USA's NOTICE OF APPEAL, (w/service thereon) cpys to (MML) and to (RE).

6/4/73 Fld Deft's Designation of record on appeal.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 70-1383-EC

[Filed December 9, 1970]

MAX JANIS, PLAINTIFF

v.

FRANK S. SCHMIDT, District
Director of Internal Revenue, DEFENDANT

AMENDED COMPLAINT FOR REFUND OF TAXES

Plaintiff complains of the defendant as follows:

I

Plaintiff is a citizen of the United States and resides in the County of Los Angeles, in the Central District of California. This Court has jurisdiction and venue of this action for refund of internal revenue taxes paid under Title 26, United States Code, Section 7422, Title 28, United States Code, Sections 1346(a)(1), 1402(a)(1), and the internal revenue laws of the United States.

II

Defendant, Frank S. Schmidt, at the time the taxes referred to herein were collected by him from plaintiff, was the District Director of Internal Revenue for the Los Angeles District of California. Defendant resides in the Central District of California. This Court has jurisdiction of this action for refund of internal revenue taxes paid under Title 26, United States Code, Section 7422, Title 28, United States Code, Section 1340, and the internal revenue laws of the United States. Venue lies in this District under Title 28, United States Code, Section 1391(b).

III

On December 5, 1968, defendant, by and through his agents, illegally, arbitrarily, and erroneously assessed an excise tax deficiency against plaintiff in the sum of $89,026.09 plus interest in the sum of $123.97, and also commenced collection activities pursuant thereto by levying on and seizing $4,940.00, property of the plaintiff.

IV

On June 18, 1969, plaintiff filed with the Internal Revenue Service a claim for refund of $4,940.00, plus interest thereon as provided by law, based upon the grounds and facts that the levy was illegal, erroneous and excessive and the assessment was arbitrary, illegal, erroneous and excessive. Attached hereto as Exhibit A, and incorporated by reference herein, is a true copy of said claim for refund.

V

More than six months have elapsed since the filing of the claim for refund, but no action has been taken thereon.

VI

No portion of the sum of $4,940.00 or interest thereon has been refunded by defendant or the Internal Revenue Service to plaintiff, and no legal offsets or credits exist with respect to those sums.

VII

Defendant owes to plaintiff $4,940.00, together with interest thereon from the date of levy as provided by law, and costs.

WHEREFORE, plaintiff demands judgment against defendant for the sum of $4,940.00, together with interest thereon as provided by law, and costs.

SHERMAN AND STURMAN

By /s/ Ronald S. Morrow
Ronald S. Morrow
Attorneys For Plaintiff

AMENDED ANSWER AND COUNTERCLAIM

(Number and Title Omitted)

(Filed: April 29, 1971)

The United States of America, defendant, in answering the allegations in plaintiff's amended complaint, denies all such allegations which are not admitted, qualified, or otherwise specifically referred to. In further answering the amended complaint, defendant:

I

Admits the allegations contained in paragraph I.

II

Admits the allegations contained in paragraph II.

III

Admits the allegations contained in paragraph III except denies that the assessment and collection were illegal, arbitrary or erroneous.

IV

Admits that a claim for refund was filed by plaintiff on or about June 19, 1969, but denies each and every allegation in the claim for refund not otherwise answered by this pleading.

V

Admits the allegations contained in paragraph V.

VI

Denies present knowledge or information concerning the truth of the allegations contained in paragraph VI.

VII

Denies the allegations contained in paragraph VII.

COUNTERCLAIM

VIII

The Court has jurisdiction of this counterclaim by virtue of 28 U.S.C. Sections 1340 and 1346(c).

IX

This counterclaim is directed by the Attorney General of the United States and is authorized by the Secretary of the Treasury or his delegate, pursuant to Section 7401 of the Internal Revenue Code of 1954.

X

The defendant files this counterclaim pursuant to Rule 13(a), Federal Rules of Civil Procedure.

XI

The plaintiff is now and was at all times pertinent to this action an individual who was a citizen of the United States and of the State of California and a resident within the Central District of California.

XII

As indicated in paragraph III of the amended complaint, defendant, United States of America, on December 5, 1968, entered its assessment against plaintiff covering the taxable period September 14, 1968 through November 30, 1968, in the total amount of $89,150.06, plus interest. The assessment was made pursuant to Section 4401 of the Internal Revenue Code of 1954 on the basis that plaintiff was a person engaged in the business of accepting wagers during the period for which the assessment was made. Of this assessment only $4,940.00 has been paid or credited, thereby leaving an outstanding liability due and owing to the United States of America in the amount of $84,210.06, plus interest.

WHEREFORE, having fully answered each and every allegation contained in plaintiff's amended complaint,

and upon its allegations set forth in its counterclaim, defendant prays that plaintiff's amended complaint be dismissed and that a judgment be entered in defendant's favor in the amount of $84,210.06, plus interest as provided by law, plus costs and such other relief which the Court may deem just and proper.

DATED: March 30, 1971

ROBERT L. MEYER
United States Attorney
CHARLES H. MAGNUSON
Assistant U.S. Attorney
Chief, Tax Division

/s/ Mason C. Lewis
MASON C. LEWIS
Attorneys for United
States of America

PLAINTIFF'S REPLY TO COUNTERCLAIM

(Number and Title Omitted)

(Filed: May 18, 1971)

COMES NOW the plaintiff in response to the counterclaim on file herein and admits, denies and alleges as follows:

I

Plaintiff admits the allegations of paragraph VIII of the counterclaim.

II

Plaintiff does not have present knowledge or information concerning the truth of the allegations contained in paragraph IX of the counterclaim, and on that ground denies each and every allegation thereof.

III

Plaintiff admits the allegations of paragraph X of the counterclaim.

IV

Plaintiff admits the allegations of paragraph XI of the counterclaim.

V

Plaintiff admits the allegations of paragraph XII of the counterclaim to the effect that an assessment was made, but specifically denies the propriety of the assessment and that he is in any way indebted to the defendants pursuant to said assessment. In this connection, plaintiff alleges that said assessment was arbitrary, capricious, erroneous and the product of illegally obtained evidence.

WHEREFORE, plaintiff prays that defendants take nothing by their counterclaim, that said counterclaim be dismissed, that plaintiff recover his costs of suit herein, and that the Court grant such other and further relief as it deems just and proper.

DATED: May 17, 1971.

SHERMAN AND STURMAN

By /s/ Herbert D. Sturman
Herbert D. Sturman
Attorneys for Plaintiff

PRE-TRIAL CONFERENCE ORDER

(Number and Title Omitted)

(Filed: September 11, 1972)

Following pre-trial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court, IT IS ORDERED:

I

This is an action for the refund of internal revenue taxes. The plaintiff herein is one Max Janis; the defendants herein are Frank S. Schmidt, District Director of Internal Revenue, and the United States of America, a sovereign body politic. The plaintiff seeks the recovery of $4,940.00, together with interest thereon as provided by law. The defendants have counterclaimed for the recovery of taxes allegedly due and owing from the plaintiff to the defendants in the net sum of $84,210.06, together with interest thereon as provided by law. The pleadings which raise the issues are as follows:

A. Amended Complaint for Refund of Taxes.
B. Amended Answer and Counterclaim.

II

Federal jurisdiction and venue are invoked upon the following grounds:

A. Plaintiff is a citizen of the United States and resides in the County of Los Angeles in the Central District of California.

B. Defendant, Frank S. Schmidt, is, and at all times relevant hereto was, the District Director of Internal Revenue for the Los Angeles District of California.

C. The defendant, United States of America, is a sovereign body politic.

D. The Court has jurisdiction and venue of this action for refund of internal revenue taxes pursuant

to 26 U.S.C. Section 7422, 28 U.S.C. Sections 1346 (a)(1), 1391(b) and 1402(a)(1), and the internal revenue laws of the United States.

E. The Court has jurisdiction of the counterclaim hereof pursuant to 28 U.S.C. Sections 1340 and 1346(c).

III

The following facts are admitted and require no proof:

A. Plaintiff is a citizen of the United States and resides in the County of Los Angeles in the Central District of California.

B. Defendant, Frank S. Schmidt, is, and at all times relevant hereto was, the District Director of Internal Revenue for the Los Angeles District of California.

C. The defendant, United States of America, is a sovereign body politic.

D. On December 5, 1968, defendants by and through their agents, assessed an excise tax deficiency against plaintiff in the sum of $89,026.09, plus interest in the sum of $123.97.

E. The items upon which the defendants based their assessment against plaintiff was originally obtained by officers of the Los Angeles Police Department pursuant to Search Warrant 1878, issued on November 26, 1968, by the Honorable Xenophon F. Lang, Judge of the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. Said search warrant was issued by Judge Lang on the basis of an affidavit in support of said search warrant, executed by one Leonard Weissman, a Los Angeles Police Officer attached to the Administrative Vice Division.

F. The aforementioned search warrant, in turn, was acted upon by the Los Angeles Police Department on November 30, 1968, at which time the plaintiff and one Morris Aaron Levine were arrested and the premises in which the plaintiff and Mr. Levine were found were searched.

G. At the time of the arrests and search, to wit, on November 30, 1968, certain property of the plaintiff and the said Morris Aaron Levine was seized by the Los Angeles police officers. Included within the seized property was cash in the sum of $4,940.00, which such cash constituted the property of the plaintiff. In addition thereto, certain betting markers and other documents were seized.

H. Following the arrests of the plaintiff and Mr. Levine as aforesaid, a prosecution was instituted in the Municipal Court of the Los Angeles Judicial District of the State of California, bearing Case No. A 239 336, and entitled *People of the State of California, Plaintiff*, v. *Max Janis and Morris Aaron Levine, Defendants.* On February 18, 1969, the plaintiff herein and Morris Aaron Levine moved to quash the aforementioned search warrant before the Honorable Xenophon F. Lang, Municipal Court Judge and also the same magistrate who had originally issued said warrant. The motion to quash the search warrant was granted by Judge Lang on the grounds that the affidavit in support thereof failed to set forth the underlying circumstances necessary to enable the issuing magistrate to independently judge the validity and reliability of the informant's information. Judge Lang further ordered that all items seized pursuant to the said search warrant be returned to the plaintiff herein and Morris Aaron Levine, save and except Judge Lang did not order the return of the cash in the sum of $4,940.00, which had been seized by the defendants on December 5, 1968.

I. The defendants predicted their assessment of an excise tax deficiency against plaintiff herein in the sum of $89,026.09, plus interest of $123.97, solely upon items which had been seized by the Los Angeles Police Department pursuant to the aforementioned search warrant and upon conversations had with representatives of the Los Angeles Police Department relating to the contents of the items seized pursuant

to the search warrant and the duration of plaintiff's alleged wagering activities.

J. On December 3, 1968, Leonard Weissman, a Los Angeles Police Department officer, informed Morris Nimovitz, a revenue officer of the Internal Revenue Service, that the plaintiff herein had been arrested for alleged bookmaking activities. Officer Weissman was the same person who had prepared the affidavit in support of the search warrant which had been quashed by Judge Lang on the basis of an insufficient affidavit in support thereof. Mr. Nimovitz proceeded to the Los Angeles Police Department and with the help of Officer Weissman, analyzed certain betting markers and information which had been seized pursuant to the aforementioned search warrant. On the basis of their analysis, the gross volume of bookmaking activities alleged to have been conducted by the plaintiff herein and Morris Aaron Levine was determined for the five days immediately preceding the arrest of the plaintiff herein and Morris Aaron Levine. Officer Weissman further informed Mr. Nimovitz that he had commenced his investigation of the plaintiff herein on September 14, 1968, which continued on an intermittent basis through November 30, 1968, the date of the arrest. On the basis of the information given by Officer Weissman to Mr. Nimovitz, the civil tax assessment was made by taking five days of activities as determined from the items seized pursuant to the aforementioned search warrant and multiplying the daily gross volume times 77 days, to wit, the period of Officer Weissman's intermittent surveillance (September 14, 1968 through November 30, 1968).

K. The sole basis of the computation of the civil tax assessment against the plaintiff herein was, therefore, the items obtained pursuant to the search warrant (five days of receipts and currency in the amount of $4,940.00) and the information furnished to Mr. Nimovitz by Officer Weissman with respect to the duration of plaintiff's alleged wagering activities.

L. The plaintiff has not filed any tax returns with either the Internal Revenue Service or the Franchise Tax Board of the State of California pertaining to his alleged bookmaking activities for the period of September 14, 1968 through November 30, 1968.

IV

The reservations as to the facts recited in Paragraph III above, are as follows:

NONE

V

The following facts, alleged by plaintiff to be true, have not been stipulated to by the parties:

A. Save and except for the intermittent surveillance of plaintiff as aforesaid, the Los Angeles Police Department did not have any information in addition to that which was in the affidavit executed by Officer Weissman in support of the aforementioned search warrant. Accordingly, the search of the premises described in the search warrant was based solely upon the information contained in the affidavit in support of the search warrant; and, in turn, the arrest of the plaintiff herein was based solely upon the evidence obtained from said search in that without such evidence, no probable cause existed for the arrest.

VI

The following facts, though not admitted, are not to be contested at the trial by evidence to the contrary:

NONE.

VII

Assuming this Court determines the legal positions advanced by the plaintiff herein with respect to his Fourth and Fifth Amendment rights adversely to the plaintiff, the following issues of fact and no others, remain to be litigated upon the trial:

A. Whether the plaintiff was engaged in bookmaking activities during the period of September 14, 1968 through November 30, 1968?

B. If the plaintiff was engaged in bookmaking activities during the period of September 14, 1968 through November 30, 1968, what were the extent of these activities, and, in particular, what was the gross volume of said activities?

C. If the plaintiff was engaged in bookmaking activities during the period of September 14, 1968 through November 30, 1968, what is his correct federal tax liability resulting from said bookmaking activities?

VIII

The exhibits to be offered at the trial, which are stipulated by the parties to be admissible without objection, are as follows:

Defendants' Exhibits

A. Certified copy of Certificate of Assessments and Payments, Internal Revenue Form 4340.

Plaintiff's Exhibits

1. Copy of Search Warrant No. 1878 issued by the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, On November 26, 1968.

2. Copy of Affidavit in Support of and Petition for Search Warrant No. 1878 executed by Leonard Weissman on November 26, 1968.

3. Copy of Return to Search Warrant No. 1878.

4. Copy of Reporter's Transcript of hearing on Tuesday, February 18, 1969 in *People of the State of California*, Plaintiff, v. *Max Janis and Morris Aaron Levine, Defendants*, Los Angeles Municipal Court Case No. A-239 336.

5. Defendants' Answers to Request for Admissions and Written Interrogatories.

6. Defendants' Amended Answers to Requests for Admissions and Written Interrogatories.

IX

The following issues of law, and no others, remain to be litigated at trial:

A. Whether the search warrant, under which the items providing the basis for the civil tax assessment in this matter were obtained, was lawfully issued and based upon good and sufficient probable cause?

B. Whether a valid civil tax assessment can be based upon items illegally seized?

C. Whether the plaintiff's testimony concerning his alleged bookmaking activities, in order to support the position that the wagering excise tax assessment was erroneous, would amount to a forfeiture of his constitutional right against self incrimination?

D. Whether the civil tax assessment herein was arbitrary and, as such, whether said assessment is null and void?

E. Whether the plaintiff would satisfy his burden of proof in order to prevail on the complaint and/or counterclaim herein by establishing that the assessment was based upon items illegally seized by the Los Angeles Police Department?

X

The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

DATED: 9/11/72.

/s/ Malcolm M. Lucas
United States District Court Judge

APPROVED AS TO FORM AND CONTENT:

SHERMAN AND STURMAN

By /s/ Herbert D. Sturman
WILLIAM D. KELLER
U.S. Attorney
CHARLES H. MAGNUSON
Asst. U.S. Attorney
Chief, Tax Division
MASON C. LEWIS
Asst. U.S. Attorney

/s/ Mason C. Lewis
MASON C. LEWIS
Attorneys for the United States of America

NOTICE OF MOTIONS AND MOTIONS:

1. FOR SUPPRESSION AND RETURN OF EVIDENCE
2. TO QUASH ASSESSMENT; AND
3. TO SHIFT BURDEN OF PROOF

(Number and Title Omitted)

(Filed: September 21, 1972)

TO THE UNITED STATES ATTORNEY:

YOU WILL PLEASE TAKE NOTICE that on October 10, 1972, at 9:30 A.M., or as soon thereafter as counsel can be heard, in the Courtroom of the Honorable Malcolm M. Lucas, United States District Judge, at 312 N. Spring Street, Los Angeles, California, the plaintiff, Max Janis, will make the following motions:

1. That the items listed below be suppressed as evidence in this proceeding and returned to him.

A. All items of personal property taken from Apartment No. 904 at 1155 N. La Cienega Boulevard, Los Angeles, California, on or about November 30, 1968, by Los Angeles Police Department Officers. Said personal property includes, but is not limited to, the following items: 2 telephones, 4x5 cards (numerous blanks), 3 stapled-group betting markers and pay owe sheets, 1 pack J.K. sports journals, 2 sport journals with figures, 1 pack betting markers, 1 group loose betting markers, 5 blank pads, 5 pens, cash in the sum of $4,940.00, 1 legal tablet with figures, miscellaneous papers with marks from persons, and phone books;

B. All copies of the items set forth in Subparagraph A above which were made and/or utilized by agents and/or officers of the Internal Revenue Service and are currently in the possession of the Internal Revenue Service; and

C. All original items set forth in Subparagraph A above currently in the possession of agents and/or officers of the Internal Revenue Service, which such items include, but are not limited to, cash in the sum of $4,940.00.

2. That the civil tax assessment made by the Internal Revenue Service in connection with this proceeding be quashed on the ground that said assessment is substantially, if not completely, the product of illegally obtained evidence; and

3. That the burden of proof normally attendant upon plaintiffs in a suit for refund of civil taxes be shifted to the defendants herein for the reason that the subject assessment is substantially the product of illegally obtained evidence.

These motions are based upon all of the files and pleadings in this case, the affidavit of Herbert D. Sturman, the exhibits attached hereto, the memorandum of points and authorities filed in conjunction herewith, and such other and further evidence as may be introduced at the hearing on these motions.

DATED: September 19, 1972

SHERMAN AND STURMAN

By /s/ Herbert D. Sturman
HERBERT D. STURMAN
Attorneys for Plaintiff,
Max Janis

DEPOSITION OF MORRIS NIMOVITZ

(Number and Title Omitted)

(Filed: July 31, 1972)

BEVERLY HILLS, CALIFORNIA,
THURSDAY, JUNE 29, 1972

1:05 P.M.

MORRIS NIMOVITZ,

called as a witness, having been duly sworn, testified as follows:

EXAMINATION

BY MR. SHERMAN:

Q Mr. Nimovitz—is that how you pronounce your name?

A Nimovitz.

Q Sir, have you ever had your deposition taken before?

A No.

Q All right. Well, then, let me explain to you a little bit about what this procedure is.

Although we are not sitting in a courtroom, with an American flag, so to speak, these are judicial proceedings, and you're being questioned here in lieu of your being questioned in court.

Do you understand that?

A Yes.

Q Everything that you say here, and the answers that you give, have the same solemnity that they'd have in a courtroom.

Do you understand that?

A Yes.

[5] Q Now, if during the course of this deposition I speak quickly, or if you don't understand something I'm saying, just tell me that you don't understand.

Now, you're being represented here today by counsel, aren't you?

A Yes.

Q Your counsel is the gentleman seated in the room, Mr. Lewis?

A Right.

Q If you want to talk to Mr. Lewis at any time during this deposition, just say so, and we can have a little recess while you talk to Mr. Lewis.

Do you have any questions?

A No.

Q Mr. Nimovitz, what is your occupation or employment?

A I'm a revenue officer with the Internal Revenue Service.

Q How long have you been so employed?

A Eleven years, approximately.

Q Do you work here in Los Angeles, California?

A Yes, I do.

MR. SHERMAN: Counsel, I'm going to show the witness Exhibit A attached to the opposition—to the defendant's response to plaintiff's Motion for Summary Judgment. I'll show it to you, Counsel.

MR. LEWIS: Okay.

[6] BY MR. SHERMAN:

Q Mr. Nimovitz, I'd like to hand you this exhibit.

You're now looking at Exhibit A attached to the defendant's response to the plaintiff's Motion for Summary Judgment.

Now, did you prepare the original of that?

A No.

Q You did not prepare it.

Do you know who did prepare it?

A I can venture a guess.

Q All right.

A It was prepared by the Special Procedures Section.

Q Okay.

Did you give the Special Procedures Section the figures upon which to prepare that?

A No.

Q Now, you are aware, are you not—may I have the document back, please.

You are aware, are you not—strike that.

Do you know Mr. Max Janis?

A Yes.

Q What is your relationship to Mr. Janis?

A He is a—what we call a taxpayer against when a wagering tax was assessed as a result of my recommendation.

Q I notice on here, if I might share this with [7] you for just a moment—

A Sure.

Q I notice on here that you have an assessment of $89,026.09, with interest of $123.97. Then you have some credits, and there is a final balance of $84,053.06.

A That's correct.

Q Now, were the figures that you recommended—were these the figures?

A I recommended the figure of $89,150.06.

Q And I take it that to get from $89,150.06 to $84,-053.06 there was a deduction made of $5,097?

A This appears to be a credit for a payment received to the account in this amount.

Q All right.

Now I'm going to tear Exhibit A off our copy of the response, and I'd like to have it marked as Exhibit A in this deposition proceeding, Counsel.

MR. LEWIS: No objection.

BY MR. SHERMAN:

Q Now handing you the document again, Mr. Nimovitz, which has been marked Exhibit A in this deposition proceeding, what relationship did you have to having the taxpayer assessed tax in the amount of $89,-150.06?

A As a revenue officer charged with the duty of recommending jeopardy assessments, I made this recommendation, and the assessment was made as a result of my recommendation.

Q May I inquire, sir, to whom did you make this [8] recommendation?

A I made this recommendation to the District Director of the Los Angeles District.

Q What is his name?

A His name—the present District Director is Mr. Frank Schmidt. And I believe he was the District Director at that time, also.

Q Did you make your recommendation directly to Mr. Schmidt or to somebody working for Mr. Schmidt?

A I made the recommendation on a form which requires a number of intermediate approvals and ends up with Mr. Schmidt's approval or signature.

Q Did Mr. Schmidt approve your precise recommendation?

A As far as I recall, it was—Mr. Schmidt was not active—he was not the District Director at the time in the Federal Building. So, it was his designee, or the Acting District Director.

Q Well, whatever person approved it—

A Yes.

Q —on behalf of Mr. Schmidt—

A It was the District Director, or the Acting District Director that affixed his signature to the recommendation for jeopardy assessment.

Q And that is how the jeopardy assessment was made?

A That is right, sir.

Q Are the figures in the jeopardy assessment, [9] that is, the assessment against the taxpayer, the figures that you recommended?

A To the best of my recollection, these are the figures I recommended, yes.

Q All right.

Now, Mr. Nimovitz, would you state upon what fact you based your recommendation.

A Based these—this recommendation on the amount of handle of wagering—wagerings that were reported to me by the Los Angeles Police Department Vice Squad.

Q Now, did you say—and I may have been a little mixed up about what you said, sir.

Did you say that you based your recommendation upon the "amount of handle of wagerings" that were reported

to you by the Los Angeles Police Department Vice Squad?

Did you say the word "handle"? That's what confused me.

A I want to qualify that.

Q Yes.

A I received figures of wagerings that Mr. Janis and Mr. Levine were involved in as bookmakers for one week, and I believe it was the week ending—let's see. November—November the 30th—I'm not sure about the—it was one week including—ending on Saturday. Okay.

I also received information that Mr. Janis was known to have been engaged in bookmaking for a period approximately three months prior to the last date, which was some time in November, that is, the date of arrest. [10] Q All right.

Now, in other words, you used the word "handle," h-a-n-d-l-e.

A By "handle," I mean the volume of business of bets taken by a bookmaker.

Q Now, in other words, sir, I think you mentioned three things—and if I'm wrong, just correct me.

The first thing was you said you received the amount of handle of wagerings reported to you by the Los Angeles Police Department Vice Squad?

A Um-hum.

Q You said you received figures of wagerings from Janis and Levine for one week ending on the Saturday that he was arrested?

A That is correct, or—

Q And you said you also received information that Janis was known to have engaged in bookmaking prior to the date of arrest, for three months?

A Approximately three months.

Q Now, who was it that told you the amount of business that Janis and Levine were doing for one week preceding their arrest?

A I believe it was Officer Weissman of the Vice Squad.

Q Was it anyone else?

A Might have been Sergeant Safford.

Q And did he just give you figures, or did he show you figures?

[11] A I think originally I received a telephonic report in which he gave gross figures of approximately, say, $70,000 for the week.

Q Whom did you receive this telephonic report from?

A It was either Officer Weissman or Sergeant Safford.

Q Did you make any notes of that?

A Yes.

Q Do you have records of that?

A We—we may have some records if the file is still available, yes.

Q I see.

You don't have those records with you?

A No, I don't.

Q Was that the only information that you received?

A No. I believe that following routine procedure in cases of this kind, I visited the Parker Center Vice Squad office and looked at the evidence seized at the time of the arrests. That included markers and owe sheets. And this includes specific figures for the Saturday preceding the arrest, and exact figures for the entire week.

And at that time I was told, also, that the surveillance of Mr. Janis and Mr. Levine went back as far as September the 14th, 1968.

Q When you went over to Parker Center, do you remember what you looked at specifically?

[12] A No, I don't.

Q Were you told where these items had been obtained that you looked at?

A They were—I was told they had been obtained at the site of the arrests.

Q You mean at Mr. Janis'—

A Mr. Janis' and Mr. Levine's apartments.

Q At one apartment?

A I don't recall if it was one apartment or two apartments. I believe there were two separate searches and two sets of records were secured.

I don't recall exactly, but I believe that was the case.

Q But you can't at this time recall whether what you saw was from Mr. Janis' apartment or whether it was from Mr. Levine's apartment; is that right?

A I recall that one set was secured from a La Cienega Boulevard address, which I see here it's 1155 North La Cienega Boulevard.

Q And you don't know who lived there; Janis or Levine or both of them?

A I think Mr. Levine lived there, because subsequent to my gettting an assessment of this wagering tax, I went to deliver the Notice of Demand for the tax, and I delivered one Notice to this address, which turned out to be Mr. Levine's address, and another one to an address on North Fuller Avenue, which was Mr. Janis' address.

Q Now, Mr. Nimovitz, did you make an independent [13] computation from the records that you saw at Parker Center in order to determine the amount of the assessment reflected in Exhibit A?

A No, I didn't.

Q Well, how did you determine the amount of the assessment in Exhibit A?

A The amount was reported to me as a total for the Saturday and the week preceding, from the records that I was looking at.

Q Well, did you—

A By the—by the arresting officers.

Q And you don't remember which arresting officers?

A I believe it was Officer Weissman.

Q Well, in other words, then, you got your figure from Officer Weissman, and not from any independent investigation of the records that you saw; is that correct?

A I was looking at the records, but I am not that versed in interpreting the codes used by bookmakers; so, it was with the explanations and the assistance of the officers that we arrived at the totals.

Q In other words, you took the officer's word for what the betting volume was?

A That is right.

Q And you couldn't verify the correctness or incorrectness of what the officer said, from your examination of the records?

A I verified after the—I verified the total [14] number of markers and the totals from the markers and the owe sheets, but as to how they were translated and the codes used on those original records, I would not say that I obtained them directly from this source.

Q In other words, would it be a fair statement to say that the officers told you what the weekly volume was, and you accepted their statements, after ascertaining from the records that there was, in fact, gambling activity?

A No.

Q Well, then—

A It wouldn't be correct.

Q Well, what would be correct?

A It would be correct to say that the officers showed me the markers. They explained what each marker translated in dollars represented, and that I totaled up those figures from the individuals and arrived at the total that I used in the assessment.

Q Is that in your working papers?

A No. Just the totals.

Q If I—

A Just the totals.

Q In other words, there would be no way for you to explain to me, by looking at your own working papers, how you arrived at the figures on Exhibit?

A No way I could explain to you, no.

Q What you had was one week's gambling activity, right?

A That is right.

[15] Q And you, through Officer Weissman's interpretation and guidance, determined that the volume was $70,000?

A It was a little less than—approximately $70,000.

Q Then, how did you get from that to the amount on Exhibit A?

A I believe that I prorated the total by the number of days in the period of the actual evidence, came to a daily amount—daily average—and I extrapolated that figure, going back to the first date that they were known to have been engaged in bookmaking.

Q Now, what, precisely, did the officers tell you about their surveillance of Mr. Janis and/or Mr. Levine which caused you to believe that they were, in fact, engaged in bookmaking activities for three months prior to the time of their arrest?

A They told me that Mr. Janis went—I'm sorry. They went to work on the Janis case beginning September 14, 1968. And I don't recall the exact details of the intermediate period since September 14th, except that there have been a number of instances where evidence of bookmaking activity came to their attention.

Q Did they tell you what the evidence of bookmaking activity was?

A At that time I don't think so.

Q At any time prior to your making or recommending the assessment which resulted in Exhibit A, did you determine what their evidence was of bookmaking activity [16] during the three months, approximately, prior to the arrest?

A I believe it could be generally referred to as surveillance of vice officers in bookmaking cases.

Q Well, what I'm asking you—

A Yes.

Q —is what you were told, if you can remember the words.

A I don't recall what I was told.

Q Well—

A Generally, it's in answer to our routine questioning of the vice officers, and you usually ask them, "Have they been under surveillance by you?" And, "If so, for how long?" And, "Do you have specific dates and instances?"

Q In other words, then, what the vice officers told you is that they had Janis and Levine under surveillance for three months, and that Janis and Levine were engaging in bookmaking activities during this period?

A That is right.

Q Did they tell you anything more specific than that?

A They probably did, but I don't recall any of the specifics.

Q Well, is there someplace that you could go to refresh your recollection?

A Well, I have had a number of wagering assessments since that time, but it may be that there were some markers found in a trash can, I believe—in the back yard [17] of one of the residences—but I—I am not particularly sure about this.

MR. LEWIS: If you're not sure, just so answer.

BY MR. SHERMAN:

Q Well, now, do you think that you were told by anyone that there were markers found in a trash can?

A I don't recall this particular situation.

Q Well, in other words, then, you have no specifics that you can recall at this time about the gambling activities that Janis and Levine were allegedly engaged in, with the exception of the markers that were found at the time of their arrest?

A No specifics.

Q Is there anyplace that you could go to locate those specifics?

A Not to my knowledge.

Q Do you feel that you made your assessment based on the fact that the officers told you that Levine and Janis were engaged in bookmaking for three months prior to the time of their arrest and nothing more?

When I say, "nothing more," I mean in addition to the markers that were found in their apartment, or the markers that you looked at.

A I believe they had specific information. I did not have the specific information at that time.

Q And they didn't give it to you as a basis for an assessment?

A No, they did not give it to me.

[18] MR. SHERMAN: Would you excuse us for just a minute, Mason.

(Recess taken.)

(The document referred to, entitled "Certificate of Assessment and Payments," was marked as Plaintiff's Exhibit A for identification by the Notary Public and attached to the deposition.)

MR. SHERMAN: Can we go back on the record.

Q Mr. Nimovitz, would it be a correct statement to say that the assessment in Exhibit A would not have been made, except for the markers that you examined in Parker Center, which you previously described, and the explanation of those markers given you by the Los Angeles Police Department Vice Officers?

A And the period of surveillance reported to me by the police.

Q Did you have any information furnished to you independently of the police—the vice officers that you mentioned—and the markers, which caused you to make this assessment?

A No.

Q In other words, I'm saying there were no informants that called you up and said, "Look, Janis and Levine are engaging in bookmaking activities of so much money"?

A That is correct. There were no other sources of information.

[19] Q Can you recall, sir, in relationship to the date on Exhibit A, when you went to Parker Center?

A It was between December the 3rd and December the 5th. I'm pretty sure I went there on December the 5th.

Q Of what year?

A The original—of 1968. And the original report was received December the 3rd, 1968, by telephone.

Q I just want to get this thing locked down in my mind.

You were first called and told by officers, whose names you are not sure of, but who you think might have been Weissman or Stafford—is that right?

A Yes.

Q —that there was an arrest of a man named Janis and a man named Levine; that they had confiscated certain monies and certain betting materials?

A That is right.

Q Now, I take it that you went over there to Parker Center for the purpose of making an assessment and seizing the monies that they had in their possession?

A Yes.

Q When you got there—this was routine, wasn't it —your going over there?

A That is right.

Q And this is something that you do in the ordinary course of business?

A Yes.

Q And nothing that was told to you in that [20] telephone conversation by itself could have caused you to make a recommendation for an assessment, could it?

A I could have, yes, if I did not have the opportunity to personally inspect the markers or the evidence.

Q But, in other words, the basis for your recommendation, Mr. Nimovitz, was your examination of those markers and an interpretation of what those markers stood for, by Los Angeles Police Department officers, in addition to their statement about prior surveillance?

A Yes.

Q Did you understand that last question?

A Well, may I restate it?

Q Yes, sir.

A The basis of my assessment was the report by the police that they had arrested two bookmakers, and they found evidence of bookmaking, and that they had figures of the amount of bets taken by the two bookmakers, and the markers and any other evidence was simply a further documentation of my assessment.

I could have made the assessment without personally inspecting those markers or the owe sheets.

Q Just based on what the officers told you?

A That is right, sir.

Q Now, you mentioned there were figures that you considered?

Now, the figures that you considered were in the markers that you were shown at Parker Center?

[21] A That is right.

Q There were no other figures that you were shown, were there, sir?

Were you shown any other figures other than those in the exhibits at Parker Center?

A No other figures.

Q And the prior three months that these people were kept under surveillance, there were no figures given you for activity during these periods?

A No, sir, no figures.

Q And you cannot recall at this time, can you, any specific description of the bookmaking activity that Janis and Levine were allegedly engaged in?

A Except for the fact that they were engaged in bookmaking.

Q Just that statement by the Los Angeles Police Department.

So, what you did, then, was you took the figures that you had on the markers, and you just concluded that they had been doing this business for three months —for the prior three months, approximately—and you made the recommendation on the assessment?

A That is right, sir.

Q And that recommendation was accepted and is reflected in Exhibit A?

A That is right.

MR. SHERMAN: I don't think I have any further questions, Counsel, if you'd like to inquire.

[22] MR. LEWIS: No questions.

MR. SHERMAN: Do you want to stipulate this can be signed in front of any notary?

MR. LEWIS: Sure.

MR. SHERMAN: And we will send you the original for Mr. Nimovitz.

MR. LEWIS: Yes.

(A discussion was held off the record.)

MR. SHERMAN: I'd like the record to reflect that counsel are, after having had a conversation—I think we can enter into some stipulation.

May it be stipulated that all of the materials seen by Mr. Nimovitz at Parker Center, that he testified about in the preceding deposition, were obtained as a result of one search at—

MR. WEBB: You have two addresses here.

MR. LEWIS: Off the record for a second.

(A discussion was held off the record.)

MR. SHERMAN: —one search at the taxpayer's residence, made pursuant to the warrant, which was an exhibit in the plaintiff's Motion for Summary Judgment?

MR. LEWIS: So stipulated.

(A discussion was held off the record.)

MR. SHERMAN: Let's go back on the record.

Mr. Lewis, I would like to thank you for being here today. I feel blessed by having so charming a man as yourself visit me.

MR. LEWIS: It's always a pleasure coming down to [23] Beverly Hills. Thank you.

MR. SHERMAN: Thank you.

(A discussion was held off the record.)

MR. SHERMAN: May it be stipulated that the assessment described in Exhibit A was, in fact, based upon the recommendation of Mr. Nimovitz, as he had earlier surmised?

MR. LEWIS: So stipulated.

MR. SHERMAN: Thank you.

Witness

DEPOSITION OF LEONARD WEISSMAN

(Number and Title Omitted)

(Filed: August 11, 1972)

[4] LEONARD WEISSMAN,

called as a witness, having been first duly sworn, testified as follows:

EXAMINATION

BY MR. SHERMAN:

Q Officer Weissman, you had occasion, did you not, to arrest one Max Janis—

A Yes.

Q —in 196—

A '8.

Q —in 1968, in November, about?

A Yes.

Q And did you effect that arrest by entering his premises?

A Yes.

Q Where were those premises; do you recall?

A They weren't his own premises. They were on the premises of Morrie Levine at 11155 North La Cienega. I think the apartment was 904.

Q Incidentally, you have testified many times in court, haven't you.

A Yes, sir.

Q And you understand that this is just a legal proceeding conducted outside of a courtroom?

[5] A Yes, sir.

Q You understand all of the ramifications?

A Yes, sir.

Q When you went into that apartment, did you enter pursuant to a search warrant?

A Yes, sir.

MR. SHERMAN: May it be stipulated, Counsel, that the search warrant that the officer is referring to is the one which is the subject matter of our case?

MR. LEWIS: Yes.

MR. SHERMAN: And may it be stipulated that this is the officer who affixed his signature to the affidavit in that warrant?

MR. LEWIS: Yes.

BY MR. SHERMAN:

Q Mr. Weissman, are you familiar with that affidavit, or would you like to look at it again?

A I've looked at it.

Q Recently?

A Yes.

Q The reason that you went into the apartment was that you did have this search warrant; is that correct?

A Yes.

Q When you entered the apartment, did you comply with Section 814 of the Penal Code—of the California Penal Code?

A Yes. We knocked at the door, and his—Mrs. Levine, I believe it was that opened the door—and [6] we told her we were—she started to close the door; it was on a safety chain. And Sergeant Vincent forced the door, and we both entered at that time.

Q What did you say when you got to the door; do you recall?

A I believe it was—I remember the words, but I'm trying to remember who was it that said it. It was either he or I that said we were police officers; we had a search warrant. I believe I said it.

Q In other words, you said, "I'm a police officer"?

A "Police officers. I have a search warrant. Police officer, City of Los Angeles," or words to that effect. I don't remember the exact words verbatim.

Q Did you ask if you could come in, or did you demand entrance?

A We demanded entrance.

Q Now, then, I take it you forced the door open?

A Yes; from the chain.

Q When you got inside, were you in the living room of the apartment?

A Yes. I think we went through the living room, because there was a double door to the apartment. The second door opened into the kitchen.

Yes, I believe it was the living room, best I can recall.

Q Where did you find Mr. Janis?

A There's a living room area, and it was against [7] the—because you came in the door; there was a wall to the left. The furthest wall to the left there was a table and two chairs facing it. Mr. Janis was on one side, Mr. Levine on the other, and the items that we recovered were on the table with two telephones between them.

Q And you recovered certain items from that table; is that correct?

A Yes, sir.

Q Then I take it that you arrested the defendants and took the papers into your possession?

A Yes.

Q That was done pursuant to this warrant that we have discussed; is that correct?

A Yes.

Q All right.

Now, Officer, did you take the papers downtown and analyze them?

A You mean for handwriting?

Q No. Just to see what, you know, they revealed.

A Oh, yes.

Q To examine their contents.

A Yes, we took them.

Q Did you have occasion shortly thereafter to speak to Mr. Nimovitz from the Internal Revenue Service?

A Yes, sir.

Q What happened; did you call him or did he call you?

A I called him, sir.

[8] Q Can you tell us what the conversation was—
A Yes.
Q —between you and him.
A I can tell you basically what it was.
Q Please.
A It's been too long. I just called and told him that we had made a bookmaking arrest; that it was taken on a search warrant; and that at the location we had recovered approximately five thousand some odd dollars in cash.

I told him that we had tabulated the markers or records that we had found. I told him what they totaled out, and I asked him if Internal Revenue was interested in this type of a case, and he said yes.

And eventually we got together on it. They came over to our office, I believe it was.

Q Now, Sergeant Weissman, is it police department policy to call the Internal Revenue Service when you have taken a substantial sum of cash related to a bookmaking arrest?

A I don't think that there's policy either way. I just—I did it as a matter of—I wouldn't say it was policy. I did it as a matter of police procedure.

In other words, here's a person that was involved in a crime that had this kind of money, and I thought of Internal Revenue.

Q Do you do that on a regular basis?

A I don't do it on what I would consider a [9] small-size book, but I considered this one a major-size book. So, I, therefore, did it.

Q Would you do that with every major-size book that you run across with a substantial amount of cash?

A I probably would.

Q To the best of your knowledge, is this the policy of your brother officers, as well?

A I know that it has been done by officers in administrative vice. I don't know if they all have done it—I don't think that they all have done it, but I don't know.

Q Mr. Nimovitz subsequently came over to talk to you?

A Yes, sir, I believe—yes, he came to our office.

Q And you showed him certain materials?

A Yes. What we had in evidence, yes.

Q And the materials you showed Mr. Nimovitz were the materials that you had taken from the apartment where Janis and Levine were arrested?

A Yes, sir.

Q Did you go over with Mr.—with the Internal Revenue agent—the documents that you had taken from the Janis apartment?

A Did I go over?

Q Well, did you translate them for him? Did you tell him what they meant?

A Yes.

[10] Q And did you go over any documentation with him that wasn't taken from the apartment?

A Not that I can recall.

Q In other words, if he made an assessment based on what he saw in your presence at the police building, it could have only been what you took from the Janis-Levine apartment?

A No. If he made an assessment—are you talking about money or time, now?

Q Money, sir.

A Oh, yeah; yes.

Q Let's talk about time.

What else did you tell him about Janis and Levine?

A At that time, nothing. There was a later conversation by telephone. It was a few days in between that elapsed. He called me, and I missed him—and I called him and missed out, and finally we got together telephonically, and he asked how long the investigation had taken, how long that I was actively—how long was I actively involved in the investigation of Max Janis and Morrie Levine.

I told him I didn't know exactly. I gave him an approximate time, told him if he'd like, I'd look up as many records as I could find and give him as close as I could.

He asked if I would, and I looked up some of my old logs and intelligence notes, things like that, and [11] as far back as I could actually document in writing without trusting strictly to my memory. I told him how long it was, and he computed the days on his own, and whatever appeared that I didn't know about.

Q Well, now, as I understand it, the computation was something to the effect that Janis and Levine had been engaged in bookmaking activities for a period of some three months prior to the arrest.

Does that sound right to you?

MR. LEWIS: Seventy-seven days.

BY MR. SHERMAN:

Q Seventy-seven days.

A The way I think that Mr. Nimovitz got that is when I wrote the affidavit, the best I can recall, Max Janis and Morrie Levine were under investigation, and as the investigation proceeded, it's not unusual for me to pull off for three or four days or a week to go on something else and come back to it.

And then at a later time in the investigation when I received information from the informant with definite phone numbers regarding Max and Morrie, it continued from there on.

The dates that I gave Mr. Nimovitz dated back on my daily logs to when I initially started working on Max and Morrie. That probably is where he got the 77 days from.

He wanted to know how long I was actively involved in investigating the two men.

[12] Q But you didn't have these men under surveillance for that 77-day period, did you?

A Intermittently, yes. In other words, I didn't work on them each and every day. I might have worked for two or three days; I might have been off for two, three. four days, a week or so, and I would have gone back on them, because it was a continuing investigation that I was working on.

But the definite and specific facts, such as when the informant gave me the phone number and said, "This

is the number that they're using right now; here's where I'm talking to him at," et cetera, whatever was testified to, that came at a later time, but that was—that was. in other words, more of the meat toward the affidavit.

But the investigation still was taking place back here. I just didn't have enough information for the warrant at that time.

Q You had no personal way, did you, to estimate the amount of bookmaking that they were doing, that is, without seeing the documents that you got in their apartment?

A You mean prior to serving the warrant?

Q Right.

A No, sir, I had no idea.

Q So, it would be fair to say, then, during the preceding period that you had no knowledge that they were working on a given day, or how much business they were doing on a given day?

A I know that the informant told me they were [13] doing good, and I know the informant told me they were doing sports and horses. Anytime you're talking about sports, you're talking in a sizeable amount of money. If you combine it with horses, you have additional.

But as far as me telling you they were doing a hundred dollars a day or $10,000 a day, I didn't know that prior. I don't think there's any way I could have.

MR. SHERMAN: Would you excuse us for just a minute, please.

(Recess taken.)

(A discussion was held off the record.)

BY MR. SHERMAN:

Q Sergeant Weissman, the only documentation that you showed Mr. Nimovitz was what you had taken from Max Janis' apartment, right?

A Yes. There was a box of cards and whatever papers and miscellaneous things that we had taken, and I left it to his discretion to do whatever he felt

he was going to do, because I didn't know what he was looking for.

Q What I'm trying to get at is you didn't show him any documentation other than what you took from the Janis-Levine apartment that day?

A No, not that I can recall.

Q When I say "that day," of course, I mean the day of the arrest.

A Yes, that's all. I don't know what else you are referring to. That is why I'm having a hard time answering.

[14] As far as I know, whatever was taken in evidence was shown to Mr. Nimovitz, and that is all that was shown to him.

Q Now, Officer, on the date that you arrested him—which I think we have concluded was sometime in November in 1968—

A Yes; yes.

Q —did you have any information in addition to what is in your affidavit?

A Not that I can think of, no.

MR. SHERMAN: I think that's all.

Mason, do you have any questions?

MR. LEWIS: No, not at this time.

MR. SHERMAN: Can we stipulate this can be signed in front of any notary?

MR. LEWIS: Yes, sure.

Witness

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Number and Title Omitted)

(Filed: February 13, 1973)

LOS ANGELES, CALIFORNIA,
TUESDAY, FEBRUARY 13, 1973; 9:30 A.M.

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[3] THE CLERK: Item 2 on this morning's calendar, case 70-1383, Max Janis v. the United States, for Court trial.

MR. SHERMAN: Richard Sherman for Mr. Janis. We are ready, your Honor.

MR. LEWIS: Good morning, your Honor. Mason Lewis for the United States. We are ready.

THE COURT: Good morning, gentlemen.

I have some preliminary observations in the findings and determinations, gentlemen. I am relucantly holding that the affidavit supporting the search warrant is insufficient under the Spinelli and Aguilar doctrines.

We therefore, I believe, are faced with the issue of whether or not the previously determined evidence, which is at least in part the basis for the Government's position, may be utilized in a civil proceeding, to wit, this proceeding.

The Court has thought at great length about this matter and feels, again reluctantly, that the rationale of the Suarez case is controlling in this matter and, utilizing that particular rationale, would hold that whatever evidence was unlawfully obtained in the criminal [4] procedures is not admissible in this procedure.

Now, Mr. Lewis, what, if anything, does that do to the Government's case? I gather from reading your various briefs filed that there may be other evidence which the Government contends—well, first of all, the Government, I appreciate, does not agree with the Court's position as to the inadmissibility of this evidence in this case, but assuming that decision, is there evidence which

the Government contends is nevertheless admissible which is not the subject of previous illegal search?

MR. LEWIS: Yes, your Honor, but I would ask the Court first if we are clear on the fact that the Government does not intend to offer as evidence any of the materials illegally seized.

THE COURT: Well, certainly the record is now clear that you are not going to offer them, because they have been excluded. I gather that the Government's position is that based upon conversations at least with the arresting officers, and perhaps others, that the Government's case is based on those conversations. I believe Revenue Officer Nimovitz had certain conversations with police officers, perhaps Officer Weissman and others, and based the assessment in substance on those conversations?

MR. LEWIS: Yes, your Honor, that's correct. I would beg the Court's indulgence for a minute to back up. [5] The Court has ruled that the affidavit supporting the warrant is insufficient, which would make the search and seizure illegal.

THE COURT: Yes. This has previously been determined by a Municipal Court judge. I don't view this Court as being bound by that determination—nor did they in the Suarez case—and have re-examined the affidavit.

MR. LEWIS: All right. I understand that, your Honor. Of course, we must point out that the Suarez case was a Tax Court decision.

Well, let me just preface this a little bit. What we have here in this court that the Government was intending to offer as evidence, as indicated by the pre-trial order, is the Certificate of Assessments and Payment. This is the official document issued by the Internal Revenue Service indicating that an assessment has actually been made against the taxpayer.

All right. In the Suarez case the question of whether an assessment was valid or not could not have been decided, because Tax Court procedures provide simply that a Notice of Deficiency, an administrative procedure by the Internal Revenue Service, is the thing that is to be re-determined. An assessment is not yet made.

So there is one crucial distinction that should be appreciated between [6] Tax Court actions and actions where assessments have already been made and we are in the district courts.

As far as the Suarez decision was concerned, I think the concurring opinion explained what exactly the effect of the Court's discussion was, and it pointed out that we do not even hold that the Notice of Deficiency is invalid, because to do so, as the opinion stated, would mean that we simply no longer have any jurisdiction to consider the matter, and that, of course, did not occur in that case.

But let's go a little further. We are in the district court now. We have a case which is a refund suit. It's a run-of-the-mill refund suit, the Government thinks. The law is so well established in refund suits before the district court, in that the taxpayer, or the plaintiff suing for the refund, has the burden of proof to come forward and establish his correct tax liability, irrespective of what the Government's assessments may have been. Judge Ferguson made quite clear note of this particular rule in cited cases in the Ginsberg case in this court in 1969, and we have quoted that case specifically in our pretrial memorandum.

So I use this as a preface to explain that we really have not yet reached what the underlying basis for the assessment is, because so far the taxpayer has come forth with nothing to independently establish his own tax [7] liability. It seems to me that until that is done, the Government is not in any position or required to establish the basis for its assessments, as it were, a rebuttal of what the taxpayer is now giving to this Court in support of his burden of proof.

So to answer the Court's question, we do have information that was given to the revenue officer in this case that was secured by the revenue officer in some manner other than him looking at the materials that were seized. We do have that. But this, of course, as you stated, your Honor, was from certain conversations, as I pointed out earlier, with police officers.

But we simply reiterate here, your Honor, that it would seem that we really aren't ripe for that sort of evidence yet, even though the Government has gone to pains to put this together for the Court's information.

THE COURT: Well, I gather, and I assume that the record reflects, of course, the contents of the pretrial conference order, and "I" of that order seems to indicate that the Government has predicated their assessment of an excise-tax deficiency against the plaintiff in the particular sum—in this case it was some $89,000 plus interest. I'm now reading from the pretrial conference order, page 4, line 14—"solely upon items which had been seized by the Los Angeles Police Department pursuant [8] to the aforementioned search warrant and upon conversations had with representatives of the Los Angeles Police Department relating to the contents of the items seized pursuant to the search warrant and the duration of plaintiff's alleged wagering activities."

Now, perhaps there is some ambiguity in that, but item K on page 5, beginning at line 15, reads, "The sole basis of the computation of the civil tax assessment against the plaintiff herein was, therefore, the items obtained pursuant to the search warrant (5 days of receipts and currency in the amount of $4,940) and the information furnished to Mr. Nimovitz by Officer Weissman with respect to the duration of plaintiff's alleged wagering activities."

Clarify for me whether or not the information submitted by Officer Weissman with respect to the duration of plaintiff's alleged wagering activities was based upon, and solely based upon, an examination of the various items obtained through the utilization of the search warrant.

MR. LEWIS: All right. Officer Weissman's information concerning the duration was based upon informers' advice to Mr. Weissman for the 77-day period that we refer to in the pretrial order. I think that answers your question. Of course, the other duration was the 6 days of betting markers which Officer Weissman related to Mr. Nimovitz as a [9] basis for the gut computation of the assessment itself.

THE COURT: So, in essence, Mr. Weissman had in his possession from the search warrant betting markers which indicated a 6-day activity or 5-day activity, whatever it was—it was 5 days, was it not? 5 days' receipts in currency. —and from that he extrapolated over the period of Officer Weissman's what is termed "intermittent surveillance" from September the 14th, '68 through November the 30th, '68, to come up with the $89,000 figure?

MR. LEWIS: That basically is the mechanics of it, yes, your Honor. And when we say, "the sole basis of the computation," we hasten to explain that Officer Nimovitz received the information concerning the 6 days, concerning the $69,000 that the 6 days total to, and the—well, let's stop there. From Officer Weissman initially, during a telephone conversation, before Officer Nimovitz had the opportunity to actually go down and look at the materials. So of course Officer Weissman had no way of knowing what the markers would show or what the volume was until he saw the material itself. So in this respect the information does eventually filter down solely to the betting markers with respect to the amounts that Max Janis has taken.

THE COURT: Yes. I gather that the surveillance in and of itself, and if there has been information submitted [10] by informants, is not the basis for this assessment. In other words, does the Government contend that the surveillance alone, for example, is sufficient to have been a ground or a basis for the assessment?

MR. LEWIS: No, I don't think so alone. I think the 77 days related by Weissman to Nimovitz, though, came essentially from an informant who was saying something to the effect that Max Janis was operating the book from September 14th, and he's doing it now, and then the surveillance simply confirmed that Max Janis was in fact doing certain things which would coincide with what the informer told him, you see. So it is important to note that the assessment in this case was based upon information given to the Internal Revenue Service by a police officer which he received from

an informant. That is the duration of the assessment. That's an essential part of the assessment.

THE COURT: Yes. But at least at the moment, any finding I would make would be that that—I am not saying that would be immaterial. Of course it is an important aspect. But it would be clearly insufficient to be the basis of any assessment if we stop there. The kernel or the nut of the assessment here does not appear to be the betting markers over the 5-day period, from which, then, from that core or that essential piece of information, you [11] then can extrapolate to the 77-day period. Without the—

MR. LEWIS: No question about that, your Honor. It is important to note, of course, that Mr. Nimovitz of the Internal Revenue Service did receive this information without actually looking at or handling the betting markers themselves.

THE COURT: Let's see if I understand you, then, Mr. Lewis. Are you suggesting some type of an attenuation theory, that because Mr. Nimovitz himself did not utilize what the Court has reluctantly found to be unlawfully obtained materials, that this frees the Government, assuming the Suarez doctrine is correct, from the taint of unlawfully obtained evidence?

MR. LEWIS: Well, I would put it this way: We know that the law is an Internal Revenue agent may make an assessment on the basis of hearsay. Now, if, for example, a reporter had gotten the information—and I suppose it's free to them that certain raids had been made, arrests had been made, markers had been made—and a short story appeared that Max Janis was arrested for bookmaking; in his possession was 6 days of markers totaling $69,000; it was reported that his operation was in report for a period of 77 days; an Internal Revenue Service agent sees that, might call the LAPD to confirm the facts he has seen in the newspaper, and then go ahead and makes the assessment. Now, I [12] think we could almost say that, in effect, is what has happened here.

THE COURT: All right. Let's assume that that was the case.

MR. LEWIS: Yes.

THE COURT: And when we come down to the trial of the matter, does the Government then simply assert that they have made the assessment, and it is, as it stated in Ginsberg by Judge Ferguson, prima facie valid, and rest their case, or what would be the procedure? I'm assuming there has been some report in the newspaper which has been the basis for assessment.

MR. LEWIS: Yes. You know, it's very difficult to say, to answer that question. We have to find out first what the plaintiff has done. You see, let's say we have a situation where the assessment is considered to be totally invalid. Let's assume that it's just thrown out for whatever reasons. Completely arbitrary. It was extrapolated for a period of 15 years, and it came up with a $10 million assessment, and we're in court now on a refund action.

Now, what do we have here? We have a situation where a plaintiff is asking the Court for a refund of taxes. Now, what is being done by this plaintiff? Is the plaintiff coming in and saying, "My taxes certainly are not $10 million; they're only $5000. I rest"? See, then the Government [13] would have to come in and rebut that information in order to prevail in this action. But so far, as we see the status of this case, nothing has been indicated and nothing apparently will be indicated, noting the absence of the taxpayer in this case, to show what the correct liability is.

THE COURT: Well, has not the plaintiff, through the utilization of the pretrial conference order, of course, presented to the Court some matters which were previously determined? In other words, I don't view the the plaintiff as not having come forward with any type of position. The plaintiff, through the pretrial conference order, in the manner in which we have handled the trial, has taken a position on the law based on what are the stipulated facts in this matter, as set forth in the pretrial conference order beginning on page 2:

"The following facts are admitted and require no proof."

We have already discussed, of course, these admitted facts. Has not the plaintiff come forward—whether he has admitted burden or not is another question—with some facts based upon the stipulated and amitted facts?

MR. LEWIS: Well, I don't see what facts the plaintiff has adduced to establish what his correct liability is. The only facts—

THE COURT: Well, first of all, I assume that he [14] is denying any liability in his moving complaint, is he not? I am assuming that. That is the usual position that is taken, that there is no liability. And then he is attacking what may very well be a prima facie valid tax assessment by indicating or attempting to indicate that the evidence upon which that assessment is based was unlawfully obtained evidence. Isn't that the—

MR. LEWIS: Well, yes, but is that the proper approach for a plaintiff in a tax-refund action? Doesn't a plaintiff in a tax-refund action have to establish affirmatively what his correct tax liability is? This is the established law in tax-refund cases. And that's why I'm belaboring this point, your Honor. And there is nothing in the stipulated facts, nothing in the record, that would be probative in a trial of this matter, that would indicate what this plaintiff's correct tax liability is.

THE COURT: Well, do I gather that your position is, then, Mr. Lewis, that for some reason the plaintiff is precluded from asserting any what we can call technical defenses, such as unlawful evidence, as a basis for the Government's tax assessment; that they have to go in and say, "They say 5 days at so much. It was really 5 days at something less. And they extrapolate to 77 days, but it was only 32 days"; that they are precluded from attacking the allegedly unlawful basis of the tax assessment?

[15] MR. LEWIS: No, they're certainly free to do so, and they've done so in various motions. My only point is, your Honor, that even if all the plaintiff's motions were granted, the Court would be just at a loss to enter any kind of a judgment, because the plaintiff has not shown what his correct tax liability is. It simply would

be immaterial, my point is, your Honor; that the taxpayer can say that the tax assessment is invalid, it was based upon illegal materials, and it's snowing outside today. But the Court still is in no position to enter any judgment to determine what his tax refund should be. And I think this is the crucial point in this tax-refund action here.

THE COURT: Well, as set forth in Ginsberg, let's assume that the tax assessment is prima facie valid and, it being presumptively correct, must stand until it can be affirmatively controverted by a preponderance of the evidence provided by the taxpayer. Assuming for the sake of our discussion that the taxpayer has produced a technical legal argument that there was no admissible evidence upon which the assessment could be based, do we not have to reach the position, then, that the assessment must fall in its entirety?

MR. LEWIS: I would just read a little bit further in Judge Ferguson's decision there, your Honor. And it's cited on page 7 of our pretrial memorandum. He [16] goes on to say, "The assessment can be overturned only by evidence which clearly demonstrates the proper amount of tax which he owes the Government." And I think this is a patently accurate statement of the law in tax-refund cases.

THE COURT: Well, the sentence above that states, "One engaged in the business of accepting wagers cannot rebut the Government's wagering tax assessment against him on mere allegations that such assessment was arbitrary, excessive, invalid, and illegal."

Now, the plaintiff is alleging that the assessment was illegal, but he hasn't rested on a mere allegation in his pleading that it was illegal; we have facts presented, through the stipulated and admitted facts, which lead the Court to believe that the sole source for the ultimate assessment and the essential source for the assessment was the unlawfully obtained materials obtained through the search warrant.

MR. LEWIS: Yes. But what do you do, your Honor, though, with the second sentence, which shows what

really must be done, the affirmative burden upon the plaintiff about establishing his correct liability?

THE COURT: Well, in my judgment, the plaintiff has done more than simply allege invalidity or illegality; he has gone forward to prove that there are no admissible [17] facts to uphold the assessment, and I would think that that would relieve him of the burden, then, of —it would seem to fly in the face of it. If the Court does find, as the Court feels that it must under the stipulated facts and the law that the Court is applying, that there is no basis for the assessment, then it would seem to be a fruitless and unnecessary act for the plaintiff to rebut an assessment which has been held to be based upon illegally obtained evidence.

MR. LEWIS: Well, we—

THE COURT: The law should not require a fruitless act or an unnecessary act. If the assessment itself is flawed, flawed to the extent that it is completely based upon unlawfully obtained evidence, then there is nothing to rebut, in essence.

Now, perhaps we are involved in a semantic argument or perhaps I am not grasping your position, Mr. Lewis, and I am certainly willing to hear further from you.

MR. LEWIS: Well, I'm afraid I'd only be repetitious at this point, your Honor. It seems quite clear that certainly a first step could be for a plaintiff to come in and show that the wagering excise tax or any tax liability was arbitrary, the Internal Revenue agent might have had a grudge against a particular taxpayer, he couldn't possibly have made that much money, because he [18] was sick 360 days of the year, and so on and so on, and show that there would seem to be no rational basis for the assessment as entered by the Internal Revenue Service, and just do that properly, regardless of the reason. And it just seems to me, your Honor, that at this point in a tax-refund action we are simply left with nothing for the Court to make a judgment on, because the Court must ask, "All right, you have shown me that the Internal Revenue Service's assessment is erroneous for some reason." Now, I don't think in this case there is anything in the record—I don't even think an allegation—

that the plaintiff has not engaged in any wagering activities, and if that's the case, we can certainly rebut that without any trouble. But I don't think that's the problem here. I think the problem is the extent. So we're talking about the amount of the tax liability rather than whether there is any tax liability at all. Now—

THE COURT: You do take the position, Mr. Lewis, I gather, that the plaintiff may appropriately and properly rebut the rational basis for the assessment; I believe you just stated that?

MR. LEWIS: Well, I say he can do that, but it really is immaterial for a tax-refund action. You see, it simply is immaterial, because we don't get anywhere, because if the plaintiff came forward instead of doing all [19] that, and simply said, "My tax liability for the period is X dollars," then the presumption disappears for the Government assessment, and the Government must come forward and say, "Well, it's not X dollars. Here's the information we have to show that it's 3X dollars," you see. So it really doesn't matter. But until he says what his correct tax liability is, we don't go anywhere.

THE COURT: Well, is this some type of a technical requirement that you would impose? For example, the plaintiff, Max Janis, would take the stand and say, perhaps in a totally conclusionary fashion, "My tax liability is zero dollars," step down from the stand after appropriate cross-examination, and then the prima facie case of the Government has dissolved and they must come forward with evidence, or what?

MR. LEWIS: Well, I think that, in essence, right down to the bone, is what it is. But you say very quickly, "subject to cross-examination," and I think that's true. If the taxpayer came up there and said what his correct tax liability is, we would certainly delve into some detail on how he establishes that.

Now, we do have a burden of proof here on the taxpayer to establish his correct tax liability. It would seem to me that a Court would perhaps be reluctant to simply accept the naked statement on behalf of any taxpayer what his [20] liability was without at least explaining or supporting that statement, and we will bring that out.

THE COURT: I appreciate that. I agree with you.
MR. LEWIS: Certainly.
THE COURT: But I'm trying to find out, is it some technical mechanism which can be triggered, perhaps by a general denial of the taxpayer, which would then allow the taxpayer to determine the rational basis, to use your words, for the Government's assessment, and until he makes a general denial, at least, he is somehow estopped from attacking the rational basis of the assessment?
MR. LEWIS: Well, it wouldn't have to be the rational basis. He would simply be attacking the mathematical basis of the assessment. And I think that's correct. I think that is correct. And that's why we would have the opportunity, of course, to see what the taxpayer is going to try to establish his correct liability with, and that's what is essentially relevant in a case like this.
THE COURT: Well, again, I'm probably being redundant as well, but it doesn't seem to be necessary or material for the taxpayer to make a general denial, any more than presumptively he has in the pleadings, for us to reach the underlying legal issues and factual issues as set forth by the pretrial conference, which are the bases, the putative bases for the assessment in question here.
[21] Let's hear from Mr. Sherman. I'm tired of carrying his case for him. Perhaps he can tell us whatever he wishes to tell.
MR. SHERMAN: Your Honor, the only thing I'd like to say is this, and it's not pointed towards exactly what the Court was talking about. This is my personal feeling on the matter. It will take about a minute, if the Court will allow me that long.
Judge, I was an Assistant United States Attorney from '61 through '64. I held Mr. Lewis' job in the tax division. Now, since leaving the Government's office I've engaged exclusively in the criminal practice, both in state and federal courts, and this procedure has been a bone which has been sticking consistently in my throat for the past seven years.
Now, here is what happens: The police go out—and I'm not talking about the particular officer involved

in this case, who I happen to think is a very fine gentleman—but the police go out and they arrest somebody, usually in a narcotics case or bookmaking case. If that man has money on him they turn right around, they in effect steal that money, they call the Internal Revenue Service, and they come down and they levy.
Now, usually the attorney involved in that type situation is not an attorney experienced in tax procedures but [22] is a criminal attorney. Now, I sort of crossed into both areas. This is a practice which I think ought to be stopped. It's an illegal, dishonest, deceitful practice. I don't think the Government should be placed in a position where they take from a man, who admittedly is not a bastion in the community, who may be engaging in an illegal activity, but nevertheless is a citizen under the constitution, steal his money and then tell him that he has to get upon the stand and incriminate himself in order to obtain a refund.
I would just agree with the reasoning of the Court. I think we've set it forth in our moving papers, we've had a series of motions on discovery in this case, and I think we just finally reached the issue of whether or not the Government can base an assessment solely upon illegally obtained evidence and then force a taxpayer to take the stand and incriminate himself if he wants to get his money back. I just respectfully submit, the Court's reasoning is correct. Thank you, sir.
THE COURT: Well, I would not want to have it concluded from the record that because the Court has stated its reasoning and rationale as previously indicated, that it is holding that there was any theft of the plaintiff's money or any impropriety in the procedures of the Government. My holding is limited to the facts of this case and a belief that the evidence, as presented through the stipulations [23] and admissions of facts, requires the Court to hold that the basis for the tax assessment was substantially, if not completely, the result of an unlawful search, and that therefore the tax assessment must fall or fail. That is the limited finding of the Court and holding of the Court, and I do

not wish to have this case quoted as a precedent for any change in the Government's procedures. Each case will have to be tried on its own merits.

MR. SHERMAN: Surely, your Honor. I wasn't attempting to infer that the Court was making any finding like that. I was just telling you what was going on in my head. I think the legal issues have been discussed rather completely in the written memoranda which have been furnished to the Court, and I just have nothing to add to that.

THE COURT: All right.

Mr. Lewis, do you wish to be heard further?

MR. LEWIS: Well, I think not, your Honor. I don't know what else we can add here. We're at a position that we simply don't have in the record anywhere a statement of correct tax liability, and it will just have to be repeated that the Government's position is that in a tax-refund case, the taxpayer simply cannot meet a burden of proof in that regard, cannot simply rest upon finding the assessment illegal, and—once again I must state this, [24] your Honor: We don't have a situation where there is either no liability, such as a situation perhaps where a statute of limitations may have expired. A plaintiff in that case might come in—and he could do this under injunction proceedings, as a matter of fact—and point out to the Court that the assessment is illegal and it's invalid because it was entered at a time beyond the statute of limitations. So we're talking in a case like that, where there is simply no liability or the liability set forth in the assessment.

In this case we have nothing to show that the taxpayer was not involved in some gambling activities. The Supreme Court, in Marchetti and Grosso, went to some pains in the footnotes to explain that wagering is still a taxable activity in this country. So we have a taxable activity engaged in by the taxpayer. We have the Internal Revenue Service doing whatever it can—and it doing it in good faith, because there is no showing here that the Internal Revenue Service knew of the arrest prior to the fact or that the Los Angeles Police Department conducted the arrest with the intent of

helping the Internal Revenue Service. So we have the Internal Revenue Service doing whatever it can to protect the revenue, to tax all taxable transactions, and an assessment is made under a patently reasonable method. It didn't go a number of years, like some [25] of the other cases did, also perhaps on a reasonable basis. It just confined its tax assessment to the monetary amounts and the durations that it had fairly hard facts on.

Now, what we simply have then is an assessment made against a taxpayer who is engaged in a taxable activity. We are now in a court for a refund action, where the taxpayer must show that that assessment is incorrect because it's too high, and we submit, your Honor, that the taxpayer simply has not done that, and I think the judgment must be for the Government on that basis.

THE COURT: All right. The Court has previously indicated its reluctance—let's say unhappiness—in this extension of the exclusionary rule, a rule which has many defects and has not been successful in its primary alleged reason for being. I would hope that the Government would see fit to take this matter up to the Ninth Circuit. There is no law in the Ninth Circuit which has assisted this Court on this particular subject. I think it is a matter that needs clarification, and I would certainly urge the Government to seek an examination by the Circuit of this matter.

But the Court is going to, based on the reasons previously indicated, find for the plaintiff in this matter.

Is there anything further, gentlemen?

MR. SHERMAN: Your Honor, just as a matter of procedure, I'm not quite sure—several matters. If I [26] might address the Court. The parties in the pretrial order listed a series of exhibits which the plaintiff intended to introduce, to wit, your Honor, the search warrant, the affidavit in support of the search warrant, the return of the search warrant, the transcript of the hearings on the motion to quash in the state court, the defendants' answers to interrogatories, requests for admissions, the defendants' amended answers to inter-

rogatories and requests for admissions and the pretrial conference order itself, which has a series of stipulated facts in it, to wit, under Section III on page 2 through page 5. Now—

THE COURT: Yes. I think it's of course important that the defendants' exhibits, which are, one, the certified copy of the Certificate of Assessment and Payment, Internal Revenue Form 48340, be received in evidence, and the other exhibits of the plaintiff as enumerated. The Court, of course, has read and considered all of those before in the various pretrial motions that had been made by counsel, but I think, to have a complete record for the Circuit, that those should be received.

Are there any objections, for that matter by either side, to the exhibits of plaintiff or defendants?

MR. SHERMAN: None from the plaintiff, your Honor.

MR. LEWIS: No, your Honor.

[27] THE COURT: All right. They will be received as marked. The pretrial conference order, of course, is part of the record in this matter.

MR. SHERMAN: Now, your Honor, excuse me. If I might inquire, is it deemed stipulated that the facts A through L in the pretrial conference order under Part III on pages 2 through 5 are stipulated to be true? May we stipulate those facts are true and correct, Mr. Lewis, for the purpose of the trial?

MR. LEWIS: Yes. I think so. I think so, your Honor.

THE COURT: All right. The Court accepts the stipulation. I think that is inherent in the pretrial conference order. You have, "The following facts are admitted and require no proof," and you gentlemen have previously signed this. But the Court does accept the stipulation.

MR. SHERMAN: Thank you, your Honor. I have marked the pretrial conference order as Plaintiff's Exhibit 6, and I wonder if perhaps this shouldn't be introduced as part of the record, or does the Court deem that the one that's filed is sufficient?

THE COURT: Well, do you wish to mark it Plaintiff's Exhibit 7? You seem to have listed already six different exhibits, Mr. Sherman.

[28] MR. SHERMAN: I'm sorry, your Honor. I only have—

THE COURT: In the pretrial conference order you have listed, on page 7, six different exhibits.

MR. SHERMAN: May I have what I did, your Honor? I wonder if I numbered erroneously.

THE COURT: Let me read them into the record. The search warrant, No. 1878, is Plaintiff's Exhibit No. 1. The affidavit in support thereof is Plaintiff's Exhibit No. 2. The return to the search warrant is Plaintiff's Exhibit No. 3. A copy of the reporter's transcript in the motion to quash of February the 18th, 1969, is Exhibit 4. Exhibit 5 is defendants' Answers to Requests for Admissions and Written Interrogatories. And Exhibit 6 is defendants' Amended Answers to Requests for Admissions and Written Interrogatories.

MR. SHERMAN: I made an error, your Honor. Plaintiff's Exhibit No. 7 would be the pretrial conference order, and I would like to introduce that at this time if I may.

THE COURT: All right.

Any objection, Mr. Lewis?

MR. LEWIS: No, your Honor.

THE COURT: It will be received as marked.

(Plaintiff's Exhibit 7 was received in evidence.)

[29] MR. LEWIS: Your Honor, may I address the Court for a minute on the issue of the illegality of the search and seizure?

THE COURT: All right. Before we get to that, the defendants' Exhibit A has been offered and received, then, Mr. Lewis?

MR. LEWIS: Yes. I thought so.

THE COURT: And has the clerk been given a copy of that?

MR. LEWIS: Yes, your Honor.

THE COURT: Fine. You may be heard.

MR. LEWIS: The only question I had, your Honor, perhaps the Court would care to detail somewhat the basis for finding the affidavit insufficient. And I would preface this discussion by pointing out certain factors very briefly that we thought in the affidavit here distinguished it from Spinelli, in that not only was the reliability of the two informers established, but it was believed to be stated that the informers were speaking with personal knowledge, which we thought is an imporant factor.

Not only that, but another bookmaker was named in this affidavit, which lent some corroboration to the affidavit. An additional informer, so we had two informers giving coinciding information, and we had prior bookmaking activity of Max Janis and previous arrests and also of the [30] other bookmaker stated in the affidavit, and it would have been the Government's position—I think we did set that forth in our responses to the motion—that taken as a whole, as some of the courts have suggested, keeping in mind the policy which should favor warrant rather than no-warrant arrests, taken as a whole, the affidavit would have seemed to come within the prerequisites of Spinelli and other decisions in that regard.

THE COURT: Well, I think it's a close case, Mr. Lewis. I don't think this is an affidavit which clearly on its face, without question, doesn't meet the Spinelli and Aguliar requirements. I don't know that it's necessary for the Court to make any findings of fact, because I view this as a legal question. The Circuit can look just as well as the Court has looked at this affidavit and determine whether or not on its face it is sufficient. We have not heard any evidence, and it is not necessary to determine the validity of that affidavit to look at it, to hear evidence, and so I don't think any findings are necessary by the Court.

MR. LEWIS: All right. I was just suggesting, your Honor, what I have stated does, of course, appear on the face of the affidavit.

THE COURT: Yes, I agree with you.

MR. LEWIS: Yes. All right. Well, thank you, [31] your Honor. That should do it as far as that goes.

THE COURT: Is there anything further, gentlemen?

MR. SHERMAN: Nothing from the plaintiff, your Honor.

THE COURT: All right. The plaintiff to prepare the appropriate order and file it with the Court within five days.

MR. SHERMAN: Your Honor, I wonder if the Court would allow counsel for the plaintiff until next Monday to have the findings of fact and order?

THE COURT: Yes, that is satisfactory.

Is that satisfactory with you?

MR. LEWIS: Well, it would be Tuesday, I suppose, with the legal holiday.

MR. SHERMAN: Yes, your Honor, if the Court please, I'd appreciate that very much.

THE COURT: All right. Monday is a legal holiday.

All right. Thank you, gentlemen. We will be in recess.

MR. SHERMAN: Thank you, your Honor.

[32]

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Number and Title Omitted)

REPORTER'S CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter for the United States District Court, Central District of California.

I further certify that the foregoing 31 pages comprise a true and correct transcript of the proceedings had in the above-entitled cause on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California this 29th day of June, 1973.

/s/ Don Mehler,
DON MUHLER, CSR
Official Reporter

EXHIBIT 1

IN THE MUNICIPAL COURT OF
_____ JUDICIAL DISTRICT
COUNTY OF LOS ANGELES,
STATE OF CALIFORNIA

SEARCH WARRANT

No. 1878

County of Los Angeles

The People of the State of California to any sheriff, constable, marshal, policeman, or any other peace officer in the County of Los Angeles:

Proof, by affidavit, having been this day made before me by Leonard Weissman, #11183, LAPD, Administrative Vice that there is probable and reasonable cause for the issuance of the search warrant, as set forth in the affidavit attached hereto and made a part hereof as if fully set forth herein; you are, therefore, commanded to make immediate search in the daytime (at any time of the day or night good cause being shown therefor) of the premises located and described as 1342 N. Fuller Avenue, apt. #211, Los Angeles, California, an apartment of a multi-unit apartment house; and 1155 N. LaCienega, apt. #904, Los Angeles, California, an apartment of a multi-unit apartment house, and the persons of Max Janis, male Caucasian, date of birth 10-14-17 five feet 11 inches, 200 pounds, brown hair, brown eyes; and Morris Aaron Levine, male Caucasian, date of birth approximately 1909, five feet 9½ inches, 185 pounds, black hair, brown eyes, for the following personal property, to wit: Bookmaking paraphernalia, but not limited to owe-sheets, betting markers, professional markers, copies of sports journals, copies of the National Daily Reporter, football schedules, adding machines, ledger books, telephone and address books, disposable paper, and any and all other materials used in bookmaking, and if you find the same or any part

thereof, to bring it forthwith before me at the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California, or to any other court in which the offense in respect to which the property or things taken is triable, or retain such property in your custody, subject to the order of this court pursuant to Section 1536 of the Penal Code.

Given under my hand and dated this 26th day of November, 1968.

/s/ [Illegible]
Judge of the Municipal Court

EXHIBIT 2

IN THE MUNICIPAL COURT OF THE
LOS ANGELES JUDICIAL DISTRICT
COUNTY OF LOS ANGELES,
STATE OF CALIFORNIA

No. SW 1878

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

AFFIDAVIT IN SUPPORT OF AND
PETITION FOR SEARCH WARRANT

Personally appeared before me this 25th day of November, 1968, the affiant, Leonard Weissman, #11183, LAPD, Administrative Vice, a peace officer, who, on oath, makes complaint, and deposes and says that he has and there is probable and reasonable cause to believe, and that he does believe, that there is now on the premises located at and also described as 1342 N. Fuller Avenue, apt. #211, Los Angeles, California, an apartment of a multi-unit apartment house; and 11155 N. LaCienga, apt. #904, Los Angeles, California, an apartment of a multi-unit apartment house, and in (a) vehicle(s) described as and on the person(s) of Max Janis, male Caucasian, date of birth 10-14-17, five foot 11 inches, 200 pounds, brown hair, brown eyes; and Morris Aaron Levine, male Caucasian, date of birth approximately 1909, five feet 9½ inches, 185 pounds, black hair, brown eyes, the following personal property, to wit: Bookmaking paraphernalia, but not limited to owe-sheets, betting markers, professional markers, copies of sports journals, copies of the National Daily Reporter, football schedules, adding machines, ledger books, telephone and address books, disposable paper, and any and all other materials used in bookmaking.

Your affiant says that there is probable and reasonable cause to believe and that he does believe that the said

property constitutes: (CHECK THE APPROPRIATE BOX, OR BOXES)

( )—stolen or embezzled property;
(XX)—property or things used as the means of committing a felony;
(XX)—property or things in the possession of a person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered;
(XX)—property or things which consist of an item or constitutes evidence which tends to show that a felony has been committed, or tends to show that a particular person has committed a felony.

Your affiant says that the facts in support of the issuance of the search warrant are as follows:

Your affiant has been a police officer for the past 6½ years, employed in such capacity by the Los Angeles Police Department, and has acted and received the information set forth in this affidavit in that capacity.

Your affiant is now and has been for the past 2 years assigned to the Vice and Bookmaking Detail thereof.

On the date of November 14, 1968, at approximately 12:00 noon your affiant (received information from) a confidential, reliable informant. This informant stated that bookmaking was being conducted over telephone no. 466-0363. This informant indicated to affiant that a Max Janis was taking bets over this telephone number on both sports events and horse racing events. Additionally, this informant told your affiant that Morris Levine was involved and participated in the same bookmaking activities. The informant indicated that Levine uses telephone number 655-8084 and number 652-0617. The informant said that Morris Levine sometimes handles bookmaking activities from Max Janis' apartment.

This informant has given affiant information in the past which has led to the arrest of two individuals for violation of Section 337a, Penal Code (Bookmaking).

Both individuals were filed on by the District Attorney's Office of the County of Los Angeles and their preliminary hearings are still pending. This same informant also supplied information which led to the arrest of five other individuals on felony charges. Of these five individuals, two were filed upon by the District Attorney's Office of the County of Los Angeles. Their preliminary hearings have been held and they were bound over to Superior Court. Their trials are set for December 3, 1968. This informant has never given information which has been incorrect.

A check was made using departmental facilities of telephone number 466-0363. This telephone check indicated that this telephone number and an additional telephone number, 463-3648, were both non-published numbers listed to Max Janis at the address of 1342 N. Fuller Avenue, apt. #211, Los Angeles, California. This same telephone check indicated that there was a third published telephone number at that same location, number 463-3531, published to Nancy L. Janis. It is affiant's opinion that a bookmaker, under these circumstances, would be using the non-published numbers for his bookmaking activities, both to receive and forward bookmaking wagers. The fact that they were non-published would allow him to have the uninterrupted use of these phones for bookmaking purposes. His published phone at the location would be used for his personal (non-bookmaking) activities.

Using departmental facilities, telephone number 655-8084 and telephone number 652-0617 were checked. Both telephone numbers came back as non-published numbers listed to Morris Levine at the address of 1155 N. La-Cienega Boulevard, apt. #904, Los Angeles, California.

A check of the criminalistic records maintained by the Los Angeles Police Department was made. This check revealed that Max Janis has been arrested for violations of Section 337a, Penal Code (Bookmaking) three times and for Conspiracy to Commit Bookmaking once. The records indicate that one conviction for bookmaking resulted. As for the other arrests, no disposition was shown.

The Los Angeles Police Department criminalistic records were checked to determine the past criminal record of Morris Levine. This record checked indicated that Morris Levine has been arrested nine times for violations of Section 337a, Penal Code (Bookmaking) and Conspiracy to Commit Bookmaking. These records indicate that Morris Levine was convicted once for a violation of Section 337a, Penal Code and once for Conspiracy to Commit Bookmaking.

On November 21, 1968, your affiant was contacted by Sgt. M. Briggs, Los Angeles Police Department Administrative Vice Division. Sgt. Briggs indicated to affiant that he had been contacted by a reliable informant who told him that Max Janis and Morris Levine were currently conducting sports and horse bookmaking activities. This informant indicated to Briggs that Levine was bookmaking out of the location of 1155 N. LaCienega Boulevard, Los Angeles, California, apt. #904. Sgt. Briggs indicated to affiant that this informant had previously given information to Sgt. Briggs that has resulted in at least two arrests and convictions for violations of Section 337a, Penal Code (Bookmaking).

Your affiant has been employed as a member of the Los Angeles Police Department for the last six and one-half years. During the past two years, he has been assigned full time to the Vice and Bookmaking Detail thereof and has made approximately fifty arrests of persons for bookmaking offenses in the County of Los Angeles. He has qualified and testified as an expert witness in such field in both the Municipal and Superior Courts in the County of Los Angeles. Affiant has received training at the Los Angeles Police Academy and has worked with other policemen who are qualified in the field of bookmaking and has had numerous conversations with individuals involved in bookmaking activities.

Based on your affiant's past experience and also the fear expressed by the informant involved in this investigation, your affiant desires to keep the identity of informant secret and confidential because affiant believes that the disclosure of said informant's identity would endanger his safety and well-being, subjecting him to

harm and danger. Further, affiant believes that the disclosure of said informant's identity would destroy and impair his future usefulness to law enforcement officers engaged in investigating and uncovering illegal criminal activities.

It should be noted that Sgt. Briggs has indicated to affiant that the informant who had given him information related to this bookmaking investigation also expressed fear if his name were revealed and that he also would be subjected to harm and danger if his identity were discovered. Sgt. Briggs also indicated that if his name were revealed he felt that the revelation of said informant's identity would destroy and impair the informant's future usefulness to law enforcement officers engaged in investigating and uncovering illegal activities. It is therefore requested that this informants identity be kept secret and confidential.

From the nature and context of the information supplied by the informant to this affiant, and from the nature and context of the information which was supplied to Sgt. Briggs, as told to this affiant, it is believed that the informants did, at all times mentioned in this affidavit, unless otherwise specified, were speaking with personal knowledge.

Based on the aforementioned information, it is your affiant's expert opinion that Max Janis and Morris Levine are conducting a bookmaking operation out of the locations of 1342 N. Fuller Avenue, apt. #211, Los Angeles, California and 1155 N. LaCienega, apt. #904, Los Angeles, California.

Your affiant commenced the actual physical mechanics of preparing this affidavit and attached search warrant at 11:40 a.m. of November 25, 1968; and your affiant affixed his signature under oath to this affidavit before the undersigned magistrate at the time and date attested by said magistrate; the elapsed time reflected herein has been diligently utilized by your affiant in the mechanics of physically preparing these documents, locating and consulting with Deputy District Attorney Alan M. Genelin of this County, in reference to the aforementioned preparation; locating the appropriate magis-

trate; and transporting these documents to the magistrate for his official action in connection therewith.

Your affiant has reasonable cause to believe that grounds for the issuance of a search warrant exist, as set forth in Section 1524 of the Penal Code, based upon the aforementioned information, facts and circumstances.

Your affiant prays that a search warrant be issued, based upon the above facts, for the seizure of said property, or any part thereof, in the daytime, good cause being shown therefore, and that the same be brought before this magistrate or retained subject to the order of this court, or of any other court in which the offense in respect to which the property or things taken is triable, pursuant to Section 1536 of the Penal Code.

/s/ Leonard Weissman
(Affiant)

Subscribed and sworn to before me on this 26th day of November, 1968, at 9:55 a.m.

/s/ [Illegible]
Judge of the Municipal Court

EXHIBIT 4

IN THE MUNICIPAL COURT OF LOS ANGELES
JUDICIAL DISTRICT
COUNTY OF LOS ANGELES,
STATE OF CALIFORNIA

REPORTER'S TRANSCRIPT OF HEARING
MOTION TO QUASH

(Number and Title Omitted)

(Filed: February 18, 1969)

LOS ANGELES, CALIFORNIA,
TUESDAY, FEBRUARY 18, 1969

1:30 P.M.

THE COURT: People versus Max Janis and Morris Aaron Levine.

Will Counsel please state their appearance for the record.

MR. LEWIS: Arthur Lewis for Defendant Max Janis, your Honor.

MR. SOLOMON: May the record reflect Max Solomon representing Defendant Levine, and he is present.

MR. LEWIS: Your Honor, at this time there is a motion before the court to quash Search Warrant Number—may we have the number for the record, counsel? —1878. The motion is based upon the grounds that the affidavit doesn't state sufficient facts to justfy the issuance thereof. And, for the record, I would like to point out that we supplied the court this morning with a copy of the Opinion of the United States versus Spinelli. Counsel has the citation—perhaps we can get it into the record—which was recently handed down by the United States Supreme Court. The matter was submitted to your Honor in Chambers and you were afforded an opportunity, I believe, of reading the Opinion of the Court.

We ask the court to rule at this time on the motion.

THE COURT: Will you state the citation from the Spinelli case, please.

MR. LEWIS: For the record, your Honor, the only [3] information we have—this is from UNITED STATES LAW WEEK, that states Opinion Number 8, October Term, 1968, delivered on January 27th.

MR. SOLOMON: That's right. SPINELLI versus the United States, your Honor, came down January 27, 1969.

Your Honor, may I state that I join in the motion to quash.

THE COURT: All right. Mr. Perruzza?

MR. PERRUZZA: Yes, your Honor. For the record, People would like to contend that we have complied with *Spinelli*. We have information here by two reliable informants; refutation of that "it doesn't set out in the search warrant as to why the informants are reliable."

We also state that, yes, we proceeded to investigate the backgrounds of both the defendants in this matter and both defendants have prior criminal records concerning bookmaking; also the private phone numbers, which were checked out and which turned out to be private numbers at the address stated in the Affidavit.

That in addition to that, there is allegation in the Affidavit that at all times mentioned in the affidavit unless otherwise stated in the affidavit, that the information as supplied to Sgt. Briggs, as told to this affiant, it is believed that the informant did, and at all times mentioned in this affidavit unless otherwise specified, was speaking with personal knowledge.

[4] The People, for the record, would also like to point out to your Honor that in the statement of the United States—Spinelli versus The United States, the majority decision here says: Here the only facts supplied were that Spinelli was using two phones, two specified phones, "and that these phones are being used in gambling operations." The Court further goes on to say:

"This cannot by itself be said to support both the inference that the informer was generally trustworthy and

that he had made his charge against Spenelli on the basis of information obtained in a reliable way."

In Appendix of this decision it is set out, the only information the police supplied in the affidavit is as follows: "Federal Bureau of Investigation has been informed by confidential, reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information" . . .

MR. LEWIS: I will stipulate that, as counsel is reading, it is contained in the Opinion.

MR. PERRUZZA: For the record, your Honor. . . . "by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136."

People would also like to say, for the record, that the concurring opinion which makes this a majority decision by the United States Supreme Court, set down by Mr. Justice White, states that the majority opinion in the Spinelli case [5] is correct, that the affidavit as set out in the search warrant is adequate to supply the Magistrate with information to issue a search warrant for probable cause. In fact, Mr. White concludes his consideration in the decision by saying: "Pending full scale reconsideration of the Draper case, on the one hand, or of the Nathanson and Aguilar cases on the other, I join in the opinion of the Court and the judgment of reversal, especially since a vote to affirm would produce an equally divided court."

So at most, we have a decision by the United States Supreme Court in which the one person who makes it a decision states that the majority is wrong.

MR. LEWIS: Well, I will disagree with the conclusion that it states that they are wrong, your Honor. Your Honor can read the Opinion?

THE COURT: Is the matter submitted?

MR. LEWIS: Submitted.

MR. SOLOMON: Matter submitted.

I might state, your Honor, just for the record, that that matter has been—the entire case has been discussed, and counsel was present, and to go over the entire thing would be repetitious. I think your Honor has read it and it is—I will submit the matter.

THE COURT: Well, the court is going to grant the motion to quash, on the following grounds: First, that the application has failed to set forth the underlying circumstances [6] necessary to enable the Magistrate to independently judge the validity of the information—informant's information.

The court will concede that the second provision of the Aguilar case has been complied with, that the informant has been described and the fact of his reliability has been established in the search warrant.

And, thirdly, the court wishes to indicate that the reason for the decision is that by failure to comply with, Number 1, the warrant, the warrant does not assure that safeguard that a distinterested party might—that is, a Magistrate—might interpose itself between the police and the citizenry.

MR. LEWIS: Your Honor, I'd have one further motion. Certain items were taken from the defendants at the time of their arrest. The Officers have, pursuant to the appropriate Code Sections, brought all of the items seized to the court. There was a receipt issued at the time of the seizure. And I would ask the court at this time to make the order ordering the return of these items to the defendants, including certain moneys which were in the possession of the defendant Janis at the time of the arrest.

MR. PERRUZZA: Before your Honor rules on that, I'd like to call to your Honor's attention that there is a lien filed by the Internal Revenue on certain funds seized, that were seized in this matter, and that when counsel requests the matter to be returned, the return of these funds, that he's [7] gone beyond jurisdiction. The matter has to be heard before the Federal Courts. The lien is in the file. The clerk has the lien.

MR. LEWIS: If your Honor please, there is no matter of Federal jurisdiction at this point. Certain items were taken pursuant to the search warrant. The Magistrate has the authority, he has the jurisdiction. As a matter of fact, the Code states that the Magistrate shall order its return, not "may" order its return. The court does have the required jurisdiction. This isn't a Federal

matter as yet. It can be returned to the defendant here in the courtroom. Counsel have assignment of these funds; we can hold them, if the United States government want a levy on any moneys that may be due to the defendant. But these aren't any funds which are due to the defendant from the court or the clerk. I recognize there's levies all over. But under 1539—

THE COURT: Motion submitted?

Motion to quash search warrant granted.

All items will be ordered to be returned to the defendants excepting those funds which have been levied upon by the Internal Revenue. That matter will have to be taken up by the Internal Revenue. I can't release them.

MR. LEWIS: Well, they can't be released then. Will they be kept by the clerk? There has been no seizure by the United States Government.

THE COURT: Notice of Levy. I think kept by the clerk. [8] Is that a lien or a levy?

THE CLERK: This is a levy, Notice of Levy.

THE COURT: Levy; have to be kept by the clerk.

MR. PERRUZZA: May the court order the officers—that the funds be turned over to the clerk?

THE COURT: I would have to let the Government do that.

MR. PERRUZZA: Fine. Thank you, your Honor.

THE COURT: Bail exonerated.

MR. PERRUZZA: Thank you.

MR. SOLOMON: Thank you, your Honor.

MR. LEWIS: Your Honor, I don't want to belabor that point. The question is at this point, the officer was holding the property pursuant to the order of the court. Is he being instructed on what to do with the funds at this point?

THE COURT: No. The Government will have to plead on that. Make the necessary motion before the Government.

MR. LEWIS: Your Honor, may we have one further order? That is, the items seized and all copies?

THE COURT: Well, the People aren't here.

MR. LEWIS: Oh. All right.

Max, get the D. A. back.

MR. SOLOMON: Do you want the defendants?

MR. LEWIS: I have got one.

THE COURT: All right. Yes, Mr. Lewis?

MR. LEWIS: Your Honor, I would have an additional request: That the order read that all items taken from the defendants, as your Honor has indicated, other than the money, [9] be ordered returned, including all copies thereof which may have been made by the law enforcement agencies, and disposition. I only want the order and the record to reflect, in the event of further proceeding—I am anticipating perhaps Federal proceedings—in the event that the Government has copies of any of these items, I feel that the order indicating that there's been an unlawful seizure would be clearer.

THE COURT: Well, are there any such copies?

MR. PERRUZZA: I don't know, your Honor.

MR. LEWIS: So, if the court order read "any copies, if made."

MR. PERRUZZA: I think, your Honor, that would be beyond your jurisdiction; that the Federal Government—

MR. LEWIS: No, not the Federal Government.

That those orders and any copies which may have been made.

THE COURT: That are in Mr. Perruzza's possession?

MR. LEWIS: Yes.

MR. PERRUZZA: May the record also order that the defendant not destroy these before any other further proceeding?

THE COURT: No. I can't make that order.

MR. LEWIS: That's beyond the Code Section.

MR. SOLOMON: The Code doesn't say anything about that.

THE COURT: Order to include those items "and copies."

Do you have anything else?

MR. PERRUZZA: Thank you, your Honor.

[10] THE COURT: You're welcome.

Take a recess.

—ooOoo—

CERTIFICATE OF ASSESSMENTS AND PAYMENTS

Excise

NAME OF TAXPAYER	ADDRESS (Number, street, city, and State)	EIN OR SSN
Morris Aaron Levine and Max Janis	1155 N. LaCienega Blvd., Apt. 104, Los Angeles, Ca. 1343 N. Fuller Ave., Apt. 211, Los Angeles, Ca.	546-32-5693 550-10-2348

DATE (a)	EXPLANATION OF TRANSACTIONS (b)	ASSESSMENT (ABATEMENT) (c)	CREDIT (CREDIT REVERSAL) (d)	BALANCE (e)	DLN OR ACCOUNT NO. (f)	23C DATE (g)	PERIOD END (h)
							9-14-68 to 11-30-68
	Balance Due Return				95613340-02000-68	12-5-68	
	Tax	89,026.09					
	Interest	123.97		89,150.06			
12-5-68	First Notice						
12-5-68	Delinquent Account Issued						
2-25-69	Payment		5,097.00	84,053.06			

I certify that the foregoing transcript of the account of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated, and all assessments, penalties, interest, abatements, credits, and refunds relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

SIGNATURE OF DIRECTOR	LOCATION	DATE
F. S. Schmidt By: E. P. Weathersbee, Chief, Special Procedures Staff	Los Angeles, California	March 7, 1972

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

GPO 874-[illegible]

4340 (9-67)

Exhibit A

BEST COPY AVAILABLE

NOTICE OF APPEAL

(Number and Title Omitted)

(Filed: April 3, 1973)

TO THE PLAINTIFF AND HIS ATTORNEYS, SHERMAN AND STURMAN, 8500 WILSHIRE BOULEVARD, SUITE 908, BEVERLY HILLS, CALIFORNIA 90211:

PLEASE TAKE NOTICE that the defendants, United States of America and Frank S. Schmidt, District Director of Internal Revenue, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order entered in this case on February 27, 1973, and from the Court's denial of defendants' motion for new trial by minute order of March 26, 1973, and ruling filed on April 3, 1973.

DATED: May 25, 1973.

WILLIAM D. KELLER
United States Attorney
CHARLES H. MAGNUSON
Assistant United States Attorney
Chief, Tax Division
MASON C. LEWIS
Assistant United States Attorney

/s/ Charles H. Magnuson
CHARLES H. MAGNUSON
Attorneys for United States of America

SUPREME COURT OF THE UNITED STATES

No. 74-958

UNITED STATES, ET AL., PETITIONERS

v.

MAX JANIS

ORDER ALLOWING CERTIORARI

Filed June 9, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 588331 3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-958

UNITED STATES OF AMERICA,
et al.,

Petitioners,

vs.

MAX JANIS,

Respondent.

REPLY IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Attorneys for Respondent

IN THE

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REPLY IN OPPOSITION TO PETITION
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FOR THE NINTH CIRCUIT

Burt Marks and Richard G. Sherman, on behalf of the respondent, Max Janis, reply in opposition to petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The findings of fact, conclusions of law and order of the district court, set forth as App. A in the Government's petition, are not officially reported. The memorandum of affirmance of the Court of Appeals, set forth as App. B in the Government's petition, is not officially reported.

JURISDICTION

The judgment of the Court of Appeals, set forth as App. C in the Government's petition, was entered July 22, 1974. A petition for rehearing was denied on September 5, 1974, set forth in the Government's petition as App. C. By order dated November 27, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including February 2, 1975. On April 23, 1975, from request of respondent of April 21, 1975, an extension of time in which to file a response to the petition herein was granted to and including May 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a federal civil tax assessment is invalid when the Internal Revenue Service's knowledge of the taxpayer's liability and its computation of the amount due are based upon evidence seized by local law enforcement officers pursuant to a defective search warrant.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT

Respondent has no quarrel with the "Statement" as set forth in the Government's petition.

REASONS FOR DENYING THE WRIT

I

THE EXCLUSIONARY RULE IS APPLICABLE TO CIVIL TAX ASSESSMENT PROCEEDINGS

The District Court below found, the Ninth Circuit Court of Appeals affirmed, and the Government does not here contend that said findings are erroneous, with the exception of course of the underlying question of the legality of the search warrant affidavit, that (1) the excise tax deficiency assessed against the respondent herein was based solely upon items obtained pursuant to the search warrant in question and upon conversations with police officers relating to the contents of these items (Finding No. 8), and that (2)

> "All of the evidence utilized as the basis of defendants' assessment

> against plaintiff was obtained directly or indirectly as a result of the search pursuant to the defective search warrant as aforesaid. Consequently, the defendants' assessment against plaintiff was based in substantial part, if not completely, on illegally procured evidence, which such evidence was seized and obtained in violation of plaintiff's Fourth Amendment rights to be free from unreasonable searches and seizures." (Finding No. 15).

The question thus squarely presented concerns the effect to be given a tax assessment based solely and exclusively upon evidence obtained from the person subject to the assessment as a result of an illegal search and seizure.

We note preliminarily that while the precise question here is one of first impression in this jurisdiction, every court which has had occasion to rule on the matter, as was detailed in the "Appellants' Opening Brief" to the Ninth Circuit Court of Appeals, at pp. 34-35,

and N. 23, and in Suarez v. Commissioner (1972) 58 T.C. 792, has ruled in conformity with the rationale employed, and result achieved, by the Courts below. Perhaps the best statement of respondent's position here is set forth in Suarez where the Court, after a closely reasoned and greatly detailed opinion, in a case on all fours with that presented here, held that the position advanced by the Government herein was fundamentally erroneous. Respondent submits that not only is Suarez therefore of strong precedential value, but further that the logic of that decision is highly persuasive on its merits, and was adopted by the Ninth Circuit Court of Appeals. Because of its importance here, the holding of the District Court below, in pertinent part, is set forth in some great detail, as follows:

> "We are confronted herein with an important and fundamental question: To what extent are the prohibitions against unreasonable searches and seizures enunciated in the Fourth Amendment to the United States Constitution applicable in a civil tax proceeding?

It is a significant question and one of first impression in this Court.

> "The Fourth Amendment provides:
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> "It has been clearly established that evidence seized in violation of a defendant's rights under the Fourth Amendment (or under the Fourteenth Amendment, where the states are involved) will be excluded in a criminal trial, whether the evidence was seized by Federal or state officials. Ker v. California, 374 U.S. 23 (1963); Mapp v. Ohio, 367 U.S.

643 (1951); Elkins v. United States, 364 U.S. 206 (1960); Weeks v. United States, 232 U.S. 383 (1914). This exclusionary rule bars not only the evidence itself but all leads obtained therefrom, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), and it applies to exclude evidence illegally obtained by state officials and made available to Federal officials, Elkins v. United States, supra.

"The Supreme Court has applied the exclusionary rule in civil proceedings which had criminal overtones or involved forfeitures. See v. City of Seattle, 387 U.S. 541 (1967); Camera v. Municipal Court, 387 U.S. 523 (1967); Boyd v. United States, 116 U.S. 616 (1886).

"Thus far, the high court has not faced the exact issue presented herein, but it has repeatedly stated that the rule's purpose is to deter unconstitutional conduct, and its prior opinions, as well as decisions by other Federal courts, clearly delineate the path we should

follow. Thus, in Weeks v. United States, supra, the Court, in commenting on the scope of protection afforded by the Fourth Amendment, stated (232 U.S. at 392):

> This protection reaches all alike whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. [Emphasis added.]

"In Silverthorne Lumber Co. v. United States, supra, a criminal case extending the protection of the Amendment to a corporation, the Court stated (251 U.S. at 392):

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. [Emphasis added.]

"Subsequently, the Court, in Elkins v. United States, supra, noted (364 U.S. at 217):

> The rule is calculated to prevent, not to repair. Its purpose is to deter -- to compel respect for the constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it.

"And in Camara v. Municipal Court, supra, which involved a warrantless search pursuant to the San Francisco Housing Code, the Court said (387 U.S. at 530):

> [W]e cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely "peripheral". It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. [Footnote omitted.]

"The foregoing statements are a reflection of the view stated for the Court by Mr. Justice Butler some 40 years ago, that

> [t]he Amendment is to be liberally construed and all owe the duty to vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. [See Go-Bart Co. v. United States, 282 U.S. 344, 357 (1931).]

"The Court of Appeals for the Second Circuit faced the question of the Fourth Amendment's applicability in a civil tax case in Pizzarello v. United States [39-1 USIC ¶15,886], 408 F.2d 578 (C.A. 2, 1969). That case involved a taxpayer's action to enjoin a levy of a jeopardy assessment for unpaid wagering taxes on money illegally seized by the Government. In reversing an order of the district court denying the injunction, the court said (at 586):

This case, however, while civil in nature is not between private parties and there are no analogous independent deterrents to, or remedies against, government violations of the Fourth Amendment. The prohibition against unreasonable searches and seizures is directed at governmental action. Absent an exclusionary rule, the Government would be free to undertake unreasonable searches and seizures in all civil cases without the possibility of unfavorable consequences. In such a situation, while the matter has not been settled by Supreme Court decision, it seems clear, even under a view of the law most favorable to the Government, that evidence so obtained, would be excluded. Because Pizzarello's tax assessment was based in substantial part, if not completely, on illegally procured evidence, the assessment if invalid.

"In United States v. Blank, 261 F. Supp. 180 (N.D. Ohio, 1966), the district court applied the Fourth Amendment exclusionary rule and directed that illegally seized evidence be destroyed (contraband) or returned (noncontraband) to a taxpayer who was threatened with a tax assessment. In so holding, it reasoned (at 182):

> Where, as here, there is a correlative civil action open to the Government which imposes a penalty upon the citizen commensurate with the criminal sanctions to which an accused, victimized by an illegal search, would be exposed, then we see no distinguishable difference between the two forms of punishment which excuses to government from complying with constitutional mandates when prosecuting their action in a civil forum. * * *

"See also the dissenting opinion of Mr. Justice Brennan, in Abel v.

United States, 362 U.S. 217, 254-256 (1960).

"Other Federal courts have indicated similar views, Knoll Associated, Inc. v. F.T.C., 397 F.2d 530 (C.A. 7, 1968) (stolen documents could not be used by the Government in an FTC proceeding); Powell v. Zurkert, 366 F.2d 634 (C.A.D.C. 1966) (discharge of a Government civilian employee); Berkowitz v. United States, 340 F.2d 168 (C.A. 1, 1975) (forfeiture); District of Columbia v. Little, 178 F.2d 13 (C.A.D.C. 1949); affirmed on other grounds, 339 U.S. 1 (1950) (housing code violation); United States v. Physic, 175 F.2d 338 (C.A. 2, 1949) (forfeiture); United States v. Butler [48-2 USTC ¶9310], 156 F.2d 897 (C.A. 10, 1946) (forfeiture); Walker v. United States, 125 F.2d 395 (C.A. 5, 1942) (forfeiture); Rogers v. United States [50-2 USTC ¶10, 777], 97 F.2d 691 (C.A. 1, 1938) (civil action to recover import duties); Laprease v. Raymours Furniture Company, 315

F. Supp. 716 (N.D.N.Y. 1970) (action to enjoin a replevia); State of Iowa v. Union Asphalt & Rocdoils, Inc. 281 F. Supp. 391 (S.D. Iowa 1968) affirmed sub nom. Standard Oil Company v. State of Iowa, 408 F.2d 1171 (CA 8, 1968) (treble damage antitrust action); United States v. Stonehill, 274 F. Supp. 420 (S.D. Cal 1967) affd. 405 F.2d 738 (C.A. 9, 1963) (enforcement of tax lien); Lord v. Kelley [641 USTC ¶9378], 223 F. Supp. 684 (D. Mass. 1963)(action to enjoin evidentiary use of illegally seized records); United States v. One 1963 Cadillac Hardtop, 220 F. Supp. 841 (E.D. Wis. 1963)(forfeiture); Lassoff v. Gray, 207 F. Supp. 843 (W.D. Ky. 1962)(action to enjoin tax assessment); United States v. $4,171.00 in United States Currency, 200 F. Supp. 28 (N.D. Ill 1961)(forfeiture); United States v. Costello, 145 F. Supp. 892 (S.D. N.Y. 1956), reversed on another issue, 247 F.2d 384 (C.A. 2, 1967) which was in turn reversed on such

other issue, 356 U.S. 256 (1958) (Denaturalization proceeding); Tovar v. Jerecki, 83 F. Supp. 47 (N.D. Ill. 1948), reversed on other grounds, [49-1 USTC ¶9218] 173 F.2d 449 (C.A. 7, 1949)(action to enjoin tax collection); Scheck v. Wara, 24 F. Supp. 776 (D. Mass. 1938) (immigration proceeding); Ex Parte Jackson, 263 F. 110 (D. Mont. 1920) (deportation proceeding). But cf. Walder v. United States, 347 U.S. 62 (1954)(use of illegally seized evidence for impeachment purposes in criminal proceeding); United States v. Schipani [71-1 USTC ¶9345], 435 F.2d 26 (C.A. 2, 1970)(use of wiretap evidence in sentencing); United States Ex rel. Sperling v. Fitzpatrict, 426 F.2d 1161 (C.A. 2, 1970)(parole revocation proceeding); NLRB v. South Bay Daily Breeze, 415 F.2d 360 (C.A. 9, 1969), certiorari denied 397 U.S. 915 (1970)(labor proceeding); Compton v. United States [64-2 USTC ¶15, 578], 334 F.2d 212 (C.A. 4, 1964)(impeachment purposes in tax assessment

proceeding).

"See also the annotation, 'Admissibility in Civil Case of Evidence Obtained by unlawful Search and Seizure,' 5 A.L.R.3d 670, 678-683, and the 1971 Supplement to 5 A.L.R.3d at pages 13-14.

"In United States v. Chase, a 1966 opinion of the District Court for the District of Columbia, unofficially reported at 67-1 USTC par. 15,733, the court stated:

It is clear that the protections of the Fourth Amendment against unreasonable search and seizure are not strictly bounded by the confines of the criminal law, but extend to certain civil proceedings. Boyd v. United States, 116 U.S. 616 (1886); Berkovitz v. United States, 340 F.2d 158 (1st Cir. 1965); Lassoff v. Gray [62-2 USTC ¶15,421], 207 F. Supp. 843 (W.D. Ky. 1962) and

cases cited at pp. 846-848. See also Annotation, 'Admissibility in Civil Case of Evidence Obtained by Unlawful Search and Seizure,' 5 ALR 3d 670, 678-83 (1966).

* * *

There is no question here but that the basis for the Government's tax assessment against Joseph Chase is evidence which it obtained in violation of the Fourth Amendment to the Constitution. There appears to be no sound reason to accord less consideration to ". . . the imperative of judicial integrity" in this proceeding than in the criminal case involving the same parties. The role of "accomplice . . . in the willful disobedience of law" is an unbecoming one for a Federal court -- regardless of the nature of the proceedings. See Elkins v. United States, * * * 364 U.S. at 223, citing McNabb v. United States,

318 U.S. 332, at 345 (1943).

"In Chase, the District Court held that a tax assessment based on illegally seized material was not admissible in evidence in a suit brought by the Government to reduce the assessment of a judgment.

"We are not unmindful of the competing considerations involved in applying the protection of the Fourth Amendment. See Amsterdam, "Search, Seizure, and Section 2255; A Comment", 112 U. of Pa. L. Rev. 378, 388-389 (1964)? But, the language of the Fourth Amendment itself admits of no distinction between searches and seizures in the context of a criminal case and those made in the context of a civil case. Indeed, it speaks in terms of the prescribed conduct or the use of the fruits thereof. Consequently our recent decisions, dealing with the inapplicability of the inhibitions of the Fifth Amendment to civil

tax proceedings, are distinguishable. Hugo Romanelli [Dec. 30, 226], 54 T.C. 1448 (1970), on appeal (C.A. 7, Aug. 11, 1970); John Harper [Dec. 30, 129], 54 T.C. 1121 (1970).

"The costs to society of applying the exclusionary rule in civil tax cases are substantially less than in the criminal area where the rule is well established. Surely the lesser objective of civil tax collection should not be accorded preferential treatment over the greater objective of convicting the guilty criminal. Moreover, we cannot ignore the additional factor that the integrity of the judicial process is also at stake. See Mapp v. Ohio supra, 367 U.S. at 639, 660 (1961); Elkins v. United States, supra, 364 U.S. at 222 (1960).

"In view of the foregoing, we conclude that any competing considerations based upon the need for effective enforcement of civil

tax liabilities (compare Elkins v. United States, supra, 364 U.S. at 222) must give way to the higher goal of protection of the individual and the necessity for preserving confidence in, rather than encouraging contempt for, the processes of Government. See Mapp v. Ohio, supra, 367 U.S. at 659 and Elkins v. United States, supra, 364 U.S. at 223, where the Supreme Court quoted with approval the following from the dissenting opinion of Mr. Justice Brandeis in Olmstead v. United States, supra, 277 U.S. at 485:

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. * * * If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

"We hold that, as a matter of law, the protective rule of the

Fourth Amendment which excludes evidence illegally obtained is applicable in a civil tax case.

"In view of the fact that the officers failed to obtain warrants and failed to announce their purpose, we hold that the disputed records, upon which the respondent has based his determination, were taken from Efrain as the result of an unreasonable search and seizure in violation of the provisions of the Fourth Amendment.

"We must now consider what effect the conclusions we have reached herein have on respondent's determination in the statutory notice in this case.

"As we have already noted the parties have stipulated that the determination here is based entirely upon the items seized by the Florida and Miami officials in their raid on the clinic and leads derived therefrom. Because of our conclusion that this evidence is subject to the exclusionary rule

developed under the Fourth Amendment, we must consider Efrain's argument that the statutory notice is illegal and void, or in the alternative, that it loses its presumption of correctness.

"The respondent contends that the notice is valid because it satisfies the requirements of section 6212(a) and (b) of the 1954 Code and because it is not proper for this Court to go behind the statutory notice to examine the facts or circumstances upon which its determinations are based.

"As a general rule, this Court will not look behind a deficiency notice to examine the evidence used or the propriety of the respondent's motives or of his administrative policy or procedure in making his determinations.

"Estate of David Smith, 57 T.C. 650, 656 (1972); Arthur Figueiredo [Dec. 20, 240], 54 T.C. 1508, 1513 (1970), on appeal (C.A. 9, Oct. 14, 1970); Philip F. Flynn [Dec.

26, 237] 40 T.C. 770, 772 (1963); Charles Crowther [Dec. 22, 595], 28 T.C. 1293, 1301 (1957) afr'd [59-2 USTC ¶9607] 269 F.2d 292 (C.A. 9, 1959); Il. F. Kerr [Dec. 2062], 5 B.T.A. 1073, 1095 (1927). As we observed in Terry C. Rosano [Dec. 2062] 46 T.C. 681, 687 (1966), 'the Commissioner's determinations may often rest upon hearsay or other inadmissible evidence, and we know of no rule of law calling for a review of the materials that were before the Commissioner in order to ascertain whether he relied upon improper evidence * * *."

"We regard the general rule enunciated in the cases cited above as sound. In reality, we are not called upon to depart from that principle in the instant case in view of the fact that the respondent has admitted by stipulation the nature of the evidence upon which he relied in preparing his statutory notice.

"We are not simply confronted herein with a case in which the respondent based his determination on evidence which is inadmissible under the usual rules of evidence, e.g., hearsay. On the contrary, it must be emphasized that the respondent, in preparing his statutory notice, relied solely on the evidence which was illegally seized in violation of the provisions of the Fourth Amendment. We are therefore not dealing with a mere procedural rule of evidence. Cf. Kaufman v. United States, 394 U.S. 217, 222-225 (1968). In Estate of David Smith, supra, we stated (57 T.C. at 656):

> [I]t is well established that -- at least where unconstitutional conduct is not involved -- the courts will not inquire into the administrative policies and procedures employed by the respondent prior to making his determination. * * * [Emphasis added].

"Where infringements of constitutional rights are involved, we are convinced that the determination in a statutory notice should be carefully scrutinized and that some sanction should be imposed or discourage the Commissioner's use of and reliance on constitutionally inadmissible evidence.

"We are unable to agree, however, with the suggestion that the statutory notice here must be declared a nullity. We find no authority for this conclusion. On the contrary, Helvering v. Taylor [35-1 USTC ¶9044], 293 U.S. 507 (1935), teaches that when a petitioner makes a showing casting doubt on the validity of a deficiency determination, the statutory notice itself is not rendered void; the result of such showing is that the respondent must then come forward with evidence to establish the existence and amount of any deficiency.

See also Federal National Bank of Shawnee [Dec. 18, 032], 16 T.C. 54, 63-64 (1951).

"We are also unable to agree with petitioner's argument that the burden of proof in the case should be shifted to respondent. In situations where illegally obtained evidence has appeared, the courts have done no more than place the burden on the prosecutor to cleanse the evidence. Alderman v. United States, 394 U.S. 165, 183 (1969); United States v. Wade, 388 U.S. 218, 240 (1967); Nordone v. United States, 308 U.S. 338, 341 (1939); Baker v. United States, 430 F.2d 499 (C.A.D.C. 1970); United States v. Coplon, 185 F.2d 629, 635 (C.A. 2, 1960). See also United States v. Blue, 384 U.S. 251, 255 (1966).

"However, in the realm of the criminal law, where the exclusionary rule was born, suppression of tainted evidence serves as an effective disincentive to its use

by the Government because the Government has the burden of proof. Clearly, such disincentive does not exist in a civil tax case if the sole action taken is to suppress such evidence and the burden of proof and of going forward with the evidence remains on the taxpayer. We therefore conclude that in addition to suppression of the tainted evidence here we must also take further action.

"We believe the respondent has a duty in the case at bar not only to cleanse the evidence but also, if he wishes to be sustained in his determination herein, to present evidence to support it which is free of unconstitutional taint.

"We therefore conclude and hold that the determination before us, based entirely on constitutionally inadmissible evidence, carries no presumption of correctness. Because the presumption of correctness has disappeared, the respondent now has the burden of going forward with the

proof to establish the existence of a deficiency with independent evidence, separate and apart from the tainted evidence. See Federal National Bank of Shawnee, supra."

We think the analysis set forth above in Suarez is correct on its face and that the District Court committed no error in applying it, nor the Circuit Court in affirming the lower Court's decision. This is not to say, however, that respondent's position rests solely upon Suarez. Suarez is but one of many cases which have expressly approved the rationale employed and the results reached by the District Court here. Suffice it to say that in addition to those cases cited in Suarez and those candidly set forth in the Appellants' Opening Brief, all of which are highly persuasive, the precise contention urged by the Government here has been flatly rejected in the following decisions: Pizzarello v. United States (2nd Cir. 1969) 408 F.2d 579; United States v. Blank (N.D.Ohio, 1966) 261 F. Supp. 180, Lassof v. Gray (W.D.Ky. 1962) 207 F.Supp. 843; United States v. Chase (1966) 67-1 USTC ¶15,733.

In lieu of unduly adding to the length of this brief, by repeating the rationales therein expressed and summarized above in the lengthy Suarez quote, respondent rather would respectfully ask that this Court examine these decisions the rationales of which are here urged to be correct and controlling here.

While we think that the cases cited above and the rationales therein expressed clearly demonstrate the position which the Circuit Court did adopt, it should further be noted, that the cases relied upon by the Government in urging the opposite, upon examination, are of little weight here.

The Government appears to argue that Walder v. United States (1954) 347 U.S. 62, holding that evidence obtained in violation of the Fourth Amendment dictates of Weeks v. United States (1914) 232 U.S. 383, may nevertheless be used for impeachment purposes in a criminal trial, and Harris v. New York (1971) 401 U.S. 222 holding that evidence obtained in violation of the Fifth Amendment dictates of Miranda v. Arizona (1966) 384

U.S. 436, are by some vague undefined process transformed into decisions mandating that illegally obtained evidence may be used by the Government in a tax assessment case. If any analogy should be drawn, however, it should be drawn on a proper understanding of the existing state of the law. In Romanelli v. Commissioner (7th Cir. 1972) 466 F.2d 872, the Court of Appeal held that given Miranda and Harris, evidence obtained in violation of Miranda could not be employed in a civil tax assessment proceeding. The holding of that Court is set forth below:

> "Petitioners sought, unsuccessfully, to have the Tax Court exclude statements made by Hugo Romanelli while the agents were searching the Parkside Liquor premises. It is clear that no Miranda warnings were given. The questions are: Was Miranda applicable to the interrogation, so that his statements could not have been used to establish a criminal charge against him? If

so, could the statements be used to establish the government's case in a civil proceeding concerning tax liability?

"Miranda is applicable to an official interrogation of one who is in custody or deprived of his freedom in any significant way. Although Romanelli was not formally placed under arrest, the surrounding circumstances were at least as coercive and indicative of custodial interrogation as in United States v. Lackey where this court held Miranda warnings required. The tax court majority, although finding it unnecessary to decide whether the interrogation was custodial, suggested that it may have been. We conclude that, during the interview, Mr. Romanelli was deprived of his freedom in a significant way, within the meaning of Miranda. Thus Miranda was applicable, and his statements could not have been used by the government to establish its case

in a criminal prosecution.

"The more difficult question is whether statements made under circumstances where Miranda warnings were required but not given may be used by the government to establish civil liability of the person interrogated.

"It has not been made clear that failure to give the Miranda warnings where required does not universally require exclusion of the statements produced by the interrogation. Harris v. New York. In Harris, statements which the state could not have used, for lack of Miranda warnings, to establish its case in chief were held admissible to impeach the defendant after he took the stand and gave testimony inconsistent with the statements. A distinction was suggested between a statement the trustworthiness of which was dubious because of coercion of greater degree than official, custodial interrogation and absence of warnings

and a statement voluntary and admissible but for the lack of warnings. There is no claim here that the statements were produced by coercion of the greater degree.

"But although the statement was made in Harris, 'Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterence flows when the evidence in question is made unavailable to the prosecution on its case in chief; the context was a criminal prosecution, where the court balanced the usefulness of the defendant's statement in exposing his perjury against the deterrent effect of exclusion and contrasted that with the decision to exclude such statement from the case in chief. We do not think. in this context, that the statement made in Harris implies a rule that the only situation where failure to give Miranda warnings will ever result in exclusion is the case in chief in a criminal

prosecution. Rather, Harris focuses attention on balancing, as a matter of policy, the deterrent effect of exclusion on proscribed police conduct in the particular circumstances.

"In such balancing process, we prefer the policy judgment that exclusion from establishing the government's civil case is an appropriate and desirable deterrent. The agents were proceeding at least in the form of preliminary states of a criminal prosecution, obtaining and executing a search warrant, and presuming to restrain Romanelli's liberty for the purpose of interrogation about matters which could as well involve criminal as civil liability. They derived substantial advantage from use of their status as law enforcement officers. To permit them, so proceeding, to infringe upon Romanelli's constitutional protection against self-incrimination, to an extent that the right to use his statements

to establish a criminal charge was forfeited, but to award the advantage of using his statements in establishing civil liability seems unwholesome and an abuse of power. The balance in favor of deterrence seems significantly different from the Harris situation, where an improperly obtained statement will be useful only in the event the defendant testifies and appears to perjure himself.

"One argument made by the government is tantamount to saying that failure to give Miranda warnings produces, by virtue of the Miranda decision, an immunity from any use of statements in establishing a criminal charge, and thus the constitutional privilege is fulfilled and the resulting statement is fair game for any other purpose. Although interrogation under an appropriately drawn immunity statute might well reach that result, we do not agree that the effect of unlawful interrogation,

ostensibly for the purpose of criminal law enforcement, should be the same."

We think it here sufficient to state that if Miranda and Harris result in Romanelli it is clear that by parity of reasoning, Weeks and Walder should result in a decision in accord with that reached by the Court below. In other words, it is one thing to say that Fourth and Fifth Amendment violations do not provide a shield for a defendant to lie at will on the witness stand without fear of contradiction, and something totally different to say that the Government, because of said violations may impose and collect a tax based solely thereon.

Harris and Walder clearly were not designed or intended to lend support to the contention urged by the Government herein, and in no real way indicate that the effect to be given violations of the Constitutional guarantees is governed solely by a narrow and limited, yet extremely esoteric, test as to whether imposition of a "penalty" in a highly technical legal sense is being attempted.

The interpretation to that effect here proposed in Petitioner's Writ simply stretches too far.

Nor can the Government find any real comfort in N.L.R.B. v. South Bay Daily Breeze (1969) 415 F.2d 360. The dicta of that decision is simply too far afield to supply any solid support for the Government here.

In conclusion, perhaps it is appropriate further to note that the terms "criminal," and "quasi criminal," "forfeiture," and "imposition of a penalty" to which Fourth Amendment protections excluding evidence obtained as a result of an illegal search and seizure clearly are applicable, were not intended by the Courts authoring those relevant decisions employing those terms to establish immutable boundaries and limits. Rather, as is the well established appropriate procedure of appellate review, they were dealing with the immediate problems and issues there confronting them. To give them any different weight here, as the cases we have cited previously by their unanimity in rejecting the contention

here urged by the Government have indicated, is to read these decisions and the language there employed out of context. Any real interpretation of those terms, again as the cases cited previously indicate, must result in the conclusion that the instant proceeding is a "forfeiture" and an "imposition of a penalty" in the real context and meaning in which these terms were employed. This, in fact, was the precise holding of United States v. Blank (N.B. Ohio 1966) 261 F. Supp. 180, 182-183. The pertinent portion of that decision is set forth below:

"We must first approach the exclusionary rule under attack here by the Government. The purpose of the exclusionary rule is to put teeth into the Fourth Amendment; the rule is the only efficacious sanction whereby courts may deter the unbridled plunder of private property by law enforcement officials. As stated by the Supreme Court in Mapp v. Ohio, 367 U.S. 643, 656, 81 S.Ct.

1684, 1692, 6 L.Ed.2d 1081 (1961), to withhold the sanction of excluding illegally seized evidence 'is to grant the right but in reality to withhold its privilege and enjoyment.' The necessity of withholding evidence which law enforcement officials secure by illegal means 'is to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it.' Elkins v. United States, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960).

"But, argues the Government, these lofty principles have no bearing on proceeding civil in nature. The Fourth Amendment, and its handmaiden--the exclusionary rule--protect the rights of an accused only in a criminal action and restrict investigative efforts of agents only when they are engaged in the enforcement of the criminal code; there is no place

in a civil action for either, nor do they restrict the activities of agents engaged in the collection of revenue through the medium of a civil action of an administrative proceeding.

"For reasons too clear, we cannot agree with the Government. Where, as here, there is a correlative civil action open to the Government which imposes a penalty upon the citizen commensurate with the criminal sanctions to which an accused, victimized by an illegal search, would be exposed, then we see no distinguishable difference between the two forms of punishment which excuses the government from complying with constitutional mandates when prosecuting their action in a civil forum. Were this not the case, all suspected violators of revenue laws would be subject to the precise evil at which the Fourth Amendment is directed -- the unreasonable disruption of the privacy of the

home--no matter how slim or unfounded might be the suspicion of their illegal activity. If there is no constitutional check on the 'investigative' efforts of federal administrative officials prosecuting civil claims, and there exist forfeiture and deficiency proceedings, civil in form, which inflict an onerous monetary penalty upon an accused which approximates the visitations of the criminal code, there is no practical restraint upon such officials. There is no rule of reasonableness. Searches can be instigated at the capricious whim of any administrative official or enforcement agent rather than as a result of the informed deliberation of 'a neutral and detached magistrate! Giordenello v. United States, 357 U.S. 480, 486, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958). If these speculative suspicions prove to be accidentally accurate, and the invasion force discovers evidence of activity which is both offensive to the criminal code and

also indicative of evasion of taxes or tariffs accountable in a civil proceeding, the Government need not bother with criminal proceedings and may avoid the exclusionary rule embodied in Rule 41 of the Federal Rules of Criminal Procedure. If the Government's assessment of the boundaries of the Fourth Amendment is correct, then it may take the accused down a civil avenue to impose its penalties while keeping itself free from the impinging requirement of reasonableness which the Fourth Amendment imposes." (Emphasis supplied.)

"If, however, the capricious invasion of a private dwelling is mistaken, what solace is there for the unfortunate victim? What comfort does the law proffer to the innocent citizen shaken by the felonious intrusion of his hearth? None. What deterrent against this unreasonable activity of the government does the law offer to the innocent? None, if the

government has described accurately the perimeter of the Fourth Amendment and the correlative utility of the exclusionary rule. The argument advanced by the Government cannot withstand the searchlight of common sense nor can it be reconciled with the latest pronouncement on the subject by the United States Supreme Court. For these reasons we must reject the Government's argument that they may use admittedly illegally seized evidence in an assessment proceeding."

II

THE DISTRICT COURT BELOW INVOKED THE PROPER PROCEDURAL REMEDIES

The real but unstated complaint of the government here is simply that even if this Court should determine that the exclusionary rule is applicable, Fourth Amendment guarantees and protections should nevertheless give way to procedural niceties of tax litigation. In other words, even if the Fourth Amendment is applicable, it should not be implemented.

A.

THE REFUND

The holding of the District below was that

> ". . . where, as in this case, illegally obtained evidence constitutes this basis of a federal tax assessment, plaintiff is not required to prove the extent of the refund to which he claims he is entitled. It is sufficient that plaintiff prove that substantially all, if not all,

the evidence upon which the assessment was based, was the result of illegally obtained evidence." (C.T. 474)

The sole contention of the government here is that this holding is erroneous in light of the rule that, "in a refund action in a federal tax proceeding, the burden is upon the claimant not only to show that the assessment is erroneous but also the correct amount of refund to which he is entitled. (citation)." (A. O.B.58). The government, however, cites no authority for this proposition in the setting of funds obtained pursuant to an assessment which assessment is based solely upon evidence obtained as the result of an illegal search and seizure. And while the government asserts that Compton v. United States, (4th Cir. 1964) 334 F.2d 212 expressly so held, a reading of that decision reveals, at p. 217, that no evidence there so obtained was introduced at trial, and the Court there explicitly refrained from passing upon that question.

The appropriate case law dealing with

evidence obtained as the result of an illegal search and seizure, rather, indicates that the approach of the Court below, or one equally protective of the rights of persons assessed, should be adopted.

In this light it should first be noted that the government's attempt to present the appearance of error by suggesting that the proper action for the Court to have taken was to shift the burden of proof and permit the government to go forward and produce whatever untainted evidence they had, is simply an inartful attempt to create a strawman. At no time was this procedural maneuver suggested below and nowhere in that record is there even the slightest indication that it desired to put on any such evidence. In this context we think this belated argument is without merit. In this context both Suarez and Pizzarello strongly support the action taken by the Court below, relieving respondent of the burden of coming forward with evidence and showing, as a pre-requisite for relief, what the correct tax should be.

Suarez held, not that the burden of proof should be shifted, but given that the determination of taxes owed was based solely upon illegally obtained evidence, the burden of going forward with evidence should be shifted. This is in effect, however, the type of action taken by the Court below, for it was clear to all parties that the government possessed no independent untainted evidence. The end result, of course, therefore, should be the same in both cases. The same tact was taken in Pizzarello, which indicates that the burden of showing what tax is due is in fact correlative only of the presumption of correctness of the assessment, and that once the assessment is shown to be invalid because based solely upon illegally obtained evidence, the taxpayer satisfied his burden, and the presumption of correctness disappears.

This is not to say, however, that the rationale behind the reluctance of the Court to make the plaintiff establish the correct amount of tax due, where the tax was assessed solely on the basis of illegally obtained evidence, stems only from

the Fourth Amendment, although it is submitted that no further support is required. Rather, additionally, Fifth Amendment considerations further come into play.

In the instant case, requiring the plaintiff to establish the amount of the refund to which he is entitled would be too harsh indeed in that it would force the plaintiff to make a choice between forfeiture of his money or the very real possibility of subjecting himself to criminal liability. It is well established, however, that compelling a person to make such a choice would be unconsitutional in that it would be violative of that person's Fifth Amendment rights.

In Garrity v. New Jersey, 385 U.S. 493, 17 L.Ed.2d 562 (1967), the Court held at 385 U.S. 565-566 that where the petitioner was forced to make a choice between self incrimination or job forfeiture such compulsion by the state was unconstitutional:

> "The option to lose their means of livelihood or to pay the penalty of self-incrimination is

the antithesis of free choice to speak out or remain silent."

In the case of Spevack v. Klein, 385 U.S. 511, 17 L.Ed. 574 (1967), the Supreme Court, citing Malloy v. Hogan, stated at 385 U.S. 514:

> "The fourteenth amendment secures against state invasion the same privileges that the fifth amendment guarantees against federal infringement - the right of a person to remain silent unless he choses to speak in the unfettered exercise of his own will and to suffer no penalty...for such silence." (emphasis supplied)

The Court in Spevack went on to state at 385 U.S. 515 that in this context "penalty is not restricted to fine or imp. sonment. It means ... the imposition of any sanction which makes assertion of the fifth amendment 'costly.'"

In DeAntonio v. Solomon, 42 F.R.D. 320 (1967), the United States District

Court for Massachusetts upheld a defendant's refusal to answer allegations of a civil complaint which would have tended to incriminate the defendant and subject him to possible prosecution for adultery. The Court stated at 42 F.R.D. 322:

> "Both motions of the plaintiff (one of those motions being a motion for summary judgment based on defendant's failure to answer said complaint) have effectively been determined by two decisions of the Supreme Court of the United States promulgated since this Court's previous memorandum, Spevack v. Klein (citations omitted). It would be inconsistent with these decisions for this court to default the defendant for exercising his privilege against self-incrimination under the circumstances of this case. Such a sanction would make the assertion of that privilege indeed 'costly' and would be the kind of watering down of the

privilege which the Supreme Court has clearly proscribed."

In the instant case, plaintiff must assert the Fifth Amendment, and, as such, refuse to testify. His dilemma is indeed real as the government would contend that plaintiff must testify to his alleged wagering activities in an effort to establish the amount of refund to which he is entitled.

In Pizzarello v. United States, 408 F.2d 579 (1969), the Court dealt with a similar situation. The Court stated at 408 F.2d 586:

"Appellant argues, nonetheless, that this legal remedy is inadequate because compliance with the burdens imposed on a taxpayer seeking a refund would open him to substantial hazards of self-incrimination. He states he would no more be able to realistically recover his money in a suit for refund on a single wagering transaction than he would for a refund if he had

paid the entire amount, without making himself vulnerable to state or federal prosecution for illegal gambling activity. He contends that in such a suit he has the burden not only of proving the assessment invalid, but also of proving the amount, if any, to which the Government is properly entitled. To meet the second burden, he asserts that he would have to testify to his gambling activities, thereby exposing himself to prosecution in New York. His sole alternative allegedly would be to forfeit the $125,882."

The Second Circuit in Pizzarello was dealing with the issue of the adequacy of a legal remedy with regard to equity jurisdiction and therefore did not make a decision with regard to the constitutionality of such a burden. However, the Court implied that such a burden would be unconstitutional. In this connection the Court stated at 408 F.2d 586:

"The situation facing Pizzarello is not too dissimilar from that presented to the Seventh Circuit in United States v. Coin and Currency in the amount of $8,674.00, 393 F.2d 499 (7th Cir. 1968), where the Court said: 'The prospect of a felony conviction involved in Marchetti of course has a greater coercive effect than the possible loss of money involved herein. On the other hand, the prospect of losing in excess of $8,000 has a substantial coercive effect. In this respect, the landmark case of Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, is controlling. Boyd was a civil forfeiture action in which the claimant was given a choice between producing a possibly incriminating document and forfeiting the property. The Court held that such a choice was impermissible under the Fourth and Fifth Amendments.'

See Garrity v. State of New Jersey, 385 U.S. 493, 496-497, 87 S.Ct. 616, 17 L.Ed.2d 562, which reaffirms and follows Boyd." (emphasis supplied)

It is clear that in the Pizzarello case, the Second Circuit, by analogizing the United States Coin and Currency case and the Boyd and Garrity cases, indicated that in a refund situation which would in effect require the plaintiff to make a choice between exposing himself to criminal liability or to forfeit his money, the plaintiff would not and could not be forced to make such an election.

In McAllister v. Cohen, 308 F.Supp. 517 (1970), the Court in discussing the Pizzarello case, stated at 308 F.Supp. 523:

"... his burden of proof in a refund suit would cause him to lose his privilege against self-incrimination and would, therefore, subject him to possible prosecution by the New York State authorities. While it

is not shown what, if any, safeguards are provided by the state of New York against compulsory self-incrimination, we agree with the reasoning of the Fifth Circuit in Campbell v. Guertersloh, 387 F.2d 878, 881 (1961) cited with the approval by the Zamaroni Court, that this Court should not attempt to control the admission of proof before the administrative agency completes its lawful functions. This could best be done in the tax refund action." (emphasis supplied)

The Court in McAlister, supra, held that it would not enjoin the Internal Revenue Service from proceeding on its assessment on the ground that the burden would be unconstitutional, and that the question of the constitutionality of the burden should more properly be determined in a tax refund action. It is to be noted that in the present case plaintiff first sought injunctive relief and subsequently amended his complaint to its

present posture, to wit, an action for tax refund.

Finally, the government appears to urge that it is possible that the plaintiff would not incur any possible criminal liability by testifying or coming forward with evidence due to the fact that the California statute of limitations with respect to bookmaking may have expired. This contention overlooks the fact that the statute of limitations is an affirmative defense which should be properly raised at the appropriate time by competent counsel. However, there are numerous instances in which the period of limitations is tolled. For example, the statute of limitations is tolled when a defendant is outside the jurisdiction. In the instant case, there is nothing in the record to establish whether or not any of the elements of tolling are present. Thus, merely because it appears that on its face the period of limitations may have expired, there may be circumstances which would deprive Mr. Janis of successfully asserting the defense of statute of limitations.

The potential criminal liability which the plaintiff herein seeks to protect himself against by asserting his Fifth Amendment rights is not necessarily criminal liability for illegal wagering activities under the laws of the State of California. Assuming the plaintiff had been engaged in illegal wagering activities, these activities would necessarily have to be reflected on various tax returns to be filed pursuant to Title 26 of the United States Code (the Internal Revenue Code). Thus, the plaintiff herein would have potential criminal liability under 26 U.S.C. §7201 (attempt to evade or defeat tax), 26 U.S.C. §7203 (willful failure to file return, supply information, or pay tax), and 26 U.S.C. §7206 (fraud and false statements). In addition thereto, the plaintiff would have potential criminal exposure under 18 U.S.C. §1955 (prohibition of illegal gambling business) and under various sections of the California Revenue and Taxation Code. A thorough analysis would undoubtedly reveal many more possible violations. However, the potential

criminal jeopardy mentioned above suffices to establish that if the plaintiff were compelled to testify in order to protect his economic interests, he would be subjecting himself to extensive criminal liability.

It should be constantly remembered that the instant case is not the typical tax assessment case. We do not have a situation where the assessment is merely arbitrary and erroneous. The assessment in this case was not only arbitrary and erroneous, but was based solely upon illegally obtained evidence procured in violation of the taxpayer's constitutional rights. Thus, because the plaintiff's tax assessment was based solely upon illegally procured evidence, the assessment was invalid as a matter of law.

Berkowitz v. United States (1st Cir. 1965) 340 F.2d 168, was a proceeding on the government's libel for forfeiture of money in violation of Internal Revenue laws. The First Circuit held that the government should not be permitted to enforce a forfeiture of money assertedly

used in violating Internal Revenue laws when it discovered and seized that money only by virtue of a direct invasion of the owner's constitutional rights in an unlawful arrest incident to which the money was seized. The fact that Berkowitz, supra, involved a forfeiture under the Internal Revenue Code is the only distinguishing feature between that case and the situation before this Honorable Court. Here, as in Berkowitz, supra, a governmental agency seized money in violation of the owner's constitutional rights in an unlawful arrest incident to which the money was seized. In the case at bar, the seizure by the Internal Revenue Service is not denominated a "forfeiture" as it has been made pursuant to §6331 of the Internal Revenue Code, while a seizure of property subject to forfeiture under the Internal Revenue Code is made under §7321 thereof. From a practical standpoint, there is no difference between a seizure under either section. In Berkowitz, supra, the government confiscated Berkowtiz's funds, while in the instant case the government

confiscated Janis' funds. Berkowitz prevailed in his case merely by showing that such confiscation was incident to an unlawful arrest. Why then should Janis not prevail herein by merely showing that such confiscation was incident to an unlawful arrest?

The requirement that the plaintiff come forward herein in order to prove the extent of the refund to which he is entitled would allow a wrongdoer to profit from its wrongs. The defendant has seized funds which were illegally in the possession of another governmental agency. The defendant has made a tax assessment based solely upon illegally obtained evidence. Nevertheless, the defendant is now asserting that the plaintiff must prove that the defendant is not legally entitled to retain that which it (the defendant) illegally acquired in the first place.

We have previously mentioned the rationale of the requirement that the taxpayer come forward to sustain his burden in an action for refund. As the

Court stated in Bar L Ranch v. Phinney (5th Cir. 1970) 426 F.2d 995, 999, "the action for refund of taxes is in the nature of a common law action for money had and received and is governed by equitable principles." This characterization of a refund action as being governed by equitable principles is long-standing and needs no additional authority. Applying this characterization to the case at bar, it becomes apparent that:

1. The wrongdoer (the defendant) should not profit from its wrongs.

2. The claimant (the plaintiff), having established that the seizure of his funds and the tax assessment were both made in derogation of his constitutional rights, should not be required to come forward with any additional evidence in order to prevail.

3. The assessment, being solely the product of illegally obtained evidence, must necessarily be null and void, and any funds collected thereunder should be returned to the plaintiff.

The irony of the present case is

that if the plaintiff herein were proceeding in the Tax Court of the United States, he would necessarily prevail by merely showing that the assessment was based solely upon illegally procured evidence. Suarez v. Commissioner, supra. However, in an excise tax case such as the one before this Honorable Court, there are no mechanics for proceeding in the Tax Court of the United States. The only forums in which a tax payer can have recourse in such a case is either the United States District Court or the United States Court of Claims. Thus, if this were an income, estate or gift tax case, the plaintiff could proceed in the Tax Court and prevail. Should the result be different merely because it is an excise tax case?

B.

THE COUNTERCLAIM

The holding of the Court below was that:

"...the defendants' counter-claim should be dismissed with

prejudice as said counterclaim seeks to reduce to judgment a federal tax assessment which was based substantially all, if not all, upon illegally obtained evidence."

Any requirement that the taxpayer come forward in an action for refund is not applicable to the situation where the government seeks to establish the validity of its assessment and to collect the taxes allegedly due with respect thereto. A suit wherein the government is either a plaintiff or a counterclaimant is not a suit in the nature of a common law action for money had and received. Where a taxpayer is defending such a suit, he need only show that the government's assessment was arbitrary. Upon such a showing, the burden is then upon the government to establish whether any deficiency exists, and, if so, in what amount. Bar L Ranch v. Phinney, supra, at page 999; United States v. Lease, 346 F.2d 696, 701 (2nd Cir. 1965). Applying the

foregoing principles to the case at bar, it is clear that the plaintiff correctly prevailed on the defendant's counterclaim as he has sustained his burden and established that the underlying assessment which is the basis of the counterclaim was solely the product of illegally obtained evidence. Consequently, the burden of proof and the burden of coming forward with respect to any possible deficiency under the counterclaim was, therefore, upon the defendant. Since the counterclaim was based solely upon evidence procured in violation of the plaintiff's constitutional rights, it is respectfully submitted that for the reason stated in Suarez and for the cases cited therein, the action of the Court below dismissing that counterclaim was eminently correct. Simply stated, with respect to the counterclaim by the government, any burden the defendant might have is satisfied when it is shown that the only proof of a purported tax liability was obtained as the result of an illegal search and seizure which was in

turn the sole basis of any assessment. As it was clear that the government could produce no other evidence, the counterclaim was properly dismissed.

CONCLUSION

For the reasons stated above, the Petition For A Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U. S.
FILED
AUG 14 1975
MICHAEL RODAK, JR., CLERK

No. 74-958

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

MAX JANIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-958

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

MAX JANIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The findings of fact, conclusions of law and order of the district court (Pet. App. 1A-11A) are not officially reported. The memorandum of affirmance of the court of appeals (Pet. App. 12A) is not officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13A) was entered July 22, 1974. A petition for rehearing was denied on September 5, 1974 (Pet. App. 14A). By order dated November 27, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including February 2, 1975 (a Sunday). The petition for a writ of

certiorari was filed on February 3, 1975, and was granted on June 9, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal civil tax assessment is invalid when the Internal Revenue Service's knowledge of the taxpayer's liability and its computation of the amount due are based upon evidence obtained by local law enforcement officers pursuant to a search warrant subsequently held to be defective.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

On November 26, 1968, the Los Angeles Police Department obtained a warrant directing a search for bookmaking paraphernalia on the persons of respondent and of Morris Levine, and at certain specified locations. The warrant was issued by a judge of the Municipal Court of the Los Angeles Judicial District and was based upon an affidavit of a police officer (Pet. App. 3A; Pltf. Exs. 1, 2; A. 67-74).

In support of the issuance of the search warrant, the police officer's affidavit stated as follows: Within the preceding two weeks, a confidential and reliable informant had told the officer that respondent and Levine were engaged in taking bets on certain unlisted telephone numbers assigned to them, which were located at two specified addresses. The informant had never in the past given information to the police that proved to be incorrect, and information given by him had led to the arrest of two other persons on bookmaking charges. Five days earlier, a fellow policeman advised the officer that another reliable informant had told him that respondent and Levine were currently conducting bookmaking activities at one of the locations specified in the affidavit. This other informant had previously given the police information that resulted in at least two arrests and convictions for illegal bookmaking activity. Both respondent and Levine had previously been arrested several times for bookmaking offenses, and each had been convicted once on such charges. Based upon the officer's six and one-half years of police experience, which included two years of full-time assignment to the Vice and Bookmaking Detail of the Los Angeles Police Department, he was of the opinion that respondent and Levine were conducting a bookmaking operation at the specified locations. The officer further stated that there was probable and reasonable cause to believe that there was property

at those locations that was used by respondent and Levine as the means of committing a felony (A. 39-46; Pltf. Ex. 2, A. 69-74).

In the ensuing search on November 30, 1968, conducted pursuant to the warrant by Los Angeles police officers, respondent and Levine were arrested and the police seized certain property. The seized property included $4,940 in cash and wagering records that belonged to respondent. Shortly thereafter, the Los Angeles police officer who had prepared the affidavit in support of the search warrant notified a revenue agent of the Internal Revenue Service that respondent had been arrested for bookmaking activity. Together with a Los Angeles police officer familiar with the codes used by bookmakers, the revenue agent analyzed the wagering records obtained pursuant to the search warrant and determined the exact gross volume of respondent's gambling enterprise for the five days immediately preceding his arrest. The Los Angeles police officer further informed the revenue agent that he had conducted a surveillance of respondent's activities that indicated that respondent was engaged in bookmaking activity during the 77-day period from September 14, 1968, through November 30, 1968, the day of his arrest (Pet. App. 3A-5A; A. 26-38).

Respondent had not filed any federal or state tax returns pertaining to his bookmaking activities for the period from September 14, 1968, through November 30, 1968. Based upon its examination of the evidence obtained by the Los Angeles police, the Internal Revenue Service, on December 5, 1968, made an assessment against respondent and Levine for wagering taxes imposed by Section 4401 of the Internal Revenue Code of 1954 in the amount of $89,026.09 plus $123.97 of interest. The amount of the assessment was computed by determining respondent's average daily gross proceeds for the five-day period covered by the wagering records analyzed by the revenue agent and multiplying the resulting figure by 77, the period of police surveillance of respondent's activities. Pursuant to the assessment, the Internal Revenue Service exercised its statutory power to levy upon the $4,940 in cash that had been seized by the Los Angeles police, in partial satisfaction of respondent's tax liability (Pet. App. 5A-6A; A. 18-19).[1]

Respondent and Levine were prosecuted for violation of local gambling laws. On February 18, 1969, they moved to quash the search warrant before the same Municipal Court judge who had issued the warrant. They urged that the affidavit in support of the warrant did not set forth in sufficient detail the reliability of the information supplied by the confidential informant, so that the issuing magistrate was unable to judge independently the reliability of

[1] Although the Service collected $4,940 from respondent under the levy, the Certificate of Assessments and Payments shows a payment of $5,097 (A. 81). The $157 discrepancy is attributable to money belonging to Levine, which was also seized and applied against the joint assessment against respondent and Levine. However, Levine has not sought a refund of the $157.

the information. The court granted the motion to quash the search warrant and ordered that all items taken pursuant to the warrant be returned to respondent and Levine, except the cash taken by the Internal Revenue Service (Pet. App. 3A-4A; Pltf. Ex. 4, A. 75-80).

Almost two years later, respondent commenced this suit in the United States District Court for the Central District of California, seeking a refund of the $4,940 collected under the levy in partial satisfaction of the $89,026.09 assessment (A. 8-9). The government answered and counterclaimed for $84,210.06, the unpaid balance of the assessment (A. 10-12).[2] In support of its position, the government proffered a copy of the Certificate of Assessments and Payments (Form 4340) (A. 81). Respondent introduced no evidence regarding the correct amount of his tax liability for the period at issue. Instead, he relied solely upon a previously filed motion to suppress the tax assessment, in which he alleged that the information upon which the assessment was based was illegally obtained (A. 13, 20).

At the outset of a hearing, the district court noted that it was "reluctantly holding that the affidavit supporting the search warrant [was] insufficient under the *Spinelli* [*Spinelli* v. *United States*, 393 U.S. 410] and *Aguilar* [*Aguilar* v. *Texas*, 378 U.S. 108]

[2] The $84,210.06 figure is the sum of the assessment plus the interest imposed ($89,026.09 + $123.97) less the $4,940 previously collected (A. 11).

doctrines" (A. 47).[3] The district court determined that all of the evidence utilized as the basis of the tax assessment was "obtained directly or indirectly as a result of the search pursuant to the defective search warrant * * *," so that the assessment was based upon evidence obtained "in violation of [respondent's] Fourth Amendment rights to be free from unreasonable searches and seizures" (Pet. App. 7A).

The district court thereupon upheld respondent's refund claim and dismissed the government's counterclaim with prejudice, stating that "substantially all, if not all" of the evidence utilized by the Internal Revenue Service in making its assessment was illegally obtained, "and, as such, the assessment was invalid." In the district court's view, once it determined that the assessment was based upon illegally obtained evidence, the assessment was invalid. It concluded that respondent "[was] not required to prove the extent of the refund to which he claims he is entitled," but that it was sufficient for him to prove "that substantially all, if not all, of the evidence upon which the assessment was based was the result of illegally obtained evidence" (Pet. App. 7A). The court of appeals affirmed on the basis of the district court's findings of fact and conclusions of law (Pet. App. 12A).

[3] The district court observed later in the hearing that the question of the sufficiency of the affidavit was "a close case" and that it did not regard the affidavit as one "which clearly on its face, without question, * * * [did not] meet the Spinelli and Aguilar requirements" (A. 64).

SUMMARY OF ARGUMENT

This case presents important questions concerning the possible application of the exclusionary rule as an impediment to the enforcement of civil claims by the federal government. In holding that a federal civil tax assessment is invalid because it was based upon evidence obtained by local law enforcement officers pursuant to a defective search warrant, the court of appeals has expanded the scope of the exclusionary rule beyond its traditional role as a rule of evidence. It has also extended to civil proceedings the Fourth Amendment exclusionary rule, which this Court has generally applied only to bar the use of illegally obtained evidence in criminal trials.

Respondent has, following the seizure of his gambling records, twice been the beneficiary of applications of the exclusionary rule. The application of the exclusionary rule by the local court to bar the use of the evidence obtained by the police in respondent's criminal prosecution was a concededly conventional (although not concededly correct) use of that judicially-created remedy to effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures. However, by invalidating the tax assessment because it was based upon illegally seized evidence, the courts below erroneously expanded the scope of the exclusionary principle beyond its proper bounds.

Two distinct lines of decisions by this Court establish the correctness of this proposition. First, this

Court has consistently held that a tax assessment is valid unless the taxpayer affirmatively establishes that he owes no additional tax by proving the correct amount of his liability. Since respondent relied at the initial stage of this proceeding entirely upon the illegality of the search and seizure by the local police and has as yet introduced no proof regarding the correct amount of his liability to show that he owed no additional tax, summary judgment in his favor was inappropriate under the rules governing tax refund and tax collection suits.

Second, the decisions of this Court confirm that the primary purpose of the exclusionary rule is to deter future unlawful police conduct in order to effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures. In this connection, the Court has generally confined the exclusionary remedy to bar the use of illegally seized evidence in criminal trials. But whatever the extent to which the exclusionary principle arguably accomplishes this deterrence objective in criminal cases, this Court has never extended its application to civil cases. Such an extension of the exclusionary rule to invalidate claims that are purely civil in character is not justifiable by reference to the goal of preventing future unlawful police conduct. Indeed, the inapplicability of the deterrence theory is especially evident in this civil case in which the allegedly illegal conduct was engaged in by agents of a local government not a party to this litigation.

A.

1. The present case is composed of two elements: (1) a refund suit brought by respondent; and (2) the post-assessment collection suit brought by the government in its counterclaim. However, the established rule common to both a taxpayer-initiated refund suit and a tax collection action brought by the government is that the Commissioner's assessment is deemed to be valid and that the taxpayer bears the burden of proving that he paid the correct amount of his liability.

In a refund suit, the usual formulation of the rule, as this Court has stated, is that the taxpayer bears the burden of proving the exact amount that he is entitled to recover. It is therefore not sufficient in a refund suit for the taxpayer to show that the assessment was erroneously computed or that it was not based upon trustworthy or competent evidence. For even if the assessment is defective in some respect, the taxpayer still may not have overpaid his tax.

The validity that attaches to the Commissioner's tax assessment in a refund suit is similarly applicable in a suit brought by the government to collect on an assessment. Thus, in a post-assessment collection action it is equally well established that the assessment is deemed to be valid and that the taxpayer has the burden of proving that he paid the correct amount of his liability.

Applying the foregoing principles to this case, it is beyond question that the courts below erred in up-

holding respondent's refund claim and in dismissing the government's counterclaim. Here, respondent introduced no evidence that established that his tax liability was zero, which was necessary in order to entitle him to a refund of $4,940 and a dismissal of the government's counterclaim. In the absence of any evidence casting doubt on the accuracy of the assessment, its presumptive validity should likewise have been controlling.

2. The radical departure by the decision below from the requirements of proof in a civil tax case appears to have been predicated upon an extension of the Fourth Amendment exclusionary rule. However, nothing in the longstanding line of decisions of this Court that a tax assessment cannot be set aside unless the taxpayer proves that he paid the correct amount of his liability suggests a different result if the information upon which the assessment was based might not be competent or admissible in a criminal proceeding against the taxpayer.

Indeed, the only other appellate decision presenting this question reached precisely the opposite result. In *Compton* v. *United States*, 334 F.2d 212, the Fourth Circuit correctly held, on essentially parallel facts, that a civil wagering tax assessment is not invalid even though it was based almost entirely upon evidence illegally obtained by local police officers. As that court stated in terms particularly appropriate to this case: "The difficulty with plaintiff's position is that she apparently misconceives the burden of proof imposed upon her and which

she must sustain in order to establish her claim of entitlement to a refund" (334 F.2d at 216).

Moreover, like *Compton*, this case does not involve an application of the conventional exclusionary rule, which only comes into play to bar the use of illegally obtained evidence at trial. Here, the government never sought to introduce at trial any of respondent's wagering records obtained by the local police at the time of his arrest. Thus, by invalidating the assessment, the decision below utilized a much more radical and unwarranted sanction that the *Compton* court expressly rejected—summary judgment against the government because its cause of action was deemed tainted. In similar circumstances, this Court has held that an indictment is not subject to challenge because the grand jury acted upon the basis of information which would be inadmissible as evidence.

B.

Apart from the fact that the exclusionary rule is not properly applicable in a case in which no illegally obtained evidence is sought to be admitted, the deterrence rationale of the rule has no application to this case. Thus, even if the government had sought to introduce copies of respondent's wagering records into evidence here, the exclusionary principle should not bar the use of such otherwise reliable evidence. As this Court has explained on numerous occasions, the purpose of the rule is to deter unlawful police conduct and not to redress the injury to the privacy of the search victim. In *United States* v. *Calandra*,

414 U.S. 338, the Court observed that the exclusionary rule was not an absolute bar to the use of illegally obtained evidence, and held that the rule did not apply to grand jury proceedings. After balancing the competing interests, the Court "decline[d] to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of public misconduct at the expense of substantially impeding the role of the grand jury" (414 U.S. at 351-352).

As a general proposition, the extension of the exclusionary rule to civil tax cases would seem unrelated to the goal of preventing unlawful police conduct. Indeed, the force of this argument is well illustrated by the facts of this case. Here, the conduct of the local police was entirely directed toward the arrest and prosecution of respondent for violation of local gambling laws. Plainly, the local police did not pursue their investigation of respondent in the hopes of requiring him to pay the federal civil wagering tax imposed by Section 4401 of the Code. Indeed, there is nothing in the record that even remotely suggests that the actions of the police pertaining to respondent were directed by or even known to officials of the Internal Revenue Service. The connection between the illegal search conducted by the police and the civil federal tax assessment is so indirect and attenuated that reliance upon the deterrence rationale would at best involve hazardous speculation. It is wholly unrealistic to assume that local police officers would be deterred from illegal searches

and seizures because a possible federal civil tax liability would be rendered uncollectible. Moreover, it is inappropriate as well as unproductive to relieve taxpayers of a federal civil tax liability for which they would otherwise be liable simply because they have suffered an illegal search at the hands of local authorities.

Finally, it is clear that an extension of the judicially-created exclusionary remedy is particularly unwarranted in this case. Here, there can be no doubt that the actions of the local police were taken entirely in good faith since they sought and obtained permission for their search from a neutral and detached judicial officer. Where police conduct is taken in complete good faith, the Court has indicated that "the deterrence rationale loses much of its force." *Michigan* v. *Tucker*, 417 U.S. 433, 447. Indeed, had the judge who issued the warrant properly performed his duties, the police could have supplied the necessary information to complete the showing of probable cause. It is therefore seriously open to question whether the technical defect in the search warrant justified an application of the exclusionary rule even in the local criminal proceeding against respondent. But whatever the merits of the application of the rule in that prior context, there is no sound justification for the extending the exclusionary principle to punish the federal tax collector for the error of a local police officer or judge.

ARGUMENT

A FEDERAL CIVIL TAX ASSESSMENT IS VALID EVEN THOUGH BASED UPON EVIDENCE OBTAINED BY LOCAL LAW ENFORCEMENT OFFICERS PURSUANT TO A SEARCH WARRANT SUBSEQUENTLY HELD TO BE DEFECTIVE

A. A Tax Assessment Challenged In A Refund Suit Or In A Collection Proceeding Is Deemed To Be Valid Unless The Taxpayer Meets The Burden Of Proving That He Paid The Correct Amount Of His Liability

1. Before discussing the burden of proof principles that govern this civil tax case, it would be appropriate to describe briefly the procedural posture in the district court. In accordance with his authority under Section 6201 of the Internal Revenue Code of 1954, the Commissioner made an assessment against respondent of approximately $89,000. Pursuant to this assessment and his collection power accorded by Section 6331 of the Code, the Commissioner levied upon the $4,940 in cash that had been seized by the local police and applied that sum in partial satisfaction of respondent's tax liability. Respondent thereupon brought this suit seeking a refund of the seized money and the government counterclaimed for the unpaid balance of the assessment.

Thus, the suit before the district court was composed of two separate elements—(1) the refund suit brought by respondent, and (2) the post-assessment collection suit brought by the government. However, the established rule common to both a taxpayer-initiated refund suit and a tax collection action brought

by the government is that the Commissioner's assessment is deemed to be valid and that the taxpayer bears the burden of proving that he paid the correct amount of his liability.

a. In a refund suit, the usual formulation of the rule is that the taxpayer bears the burden of proving the exact amount that he is entitled to recover. It is therefore not sufficient in a refund suit for the taxpayer to show that the assessment was erroneously computed or that it was not based upon trustworthy or competent evidence. This is so because even if the assessment is erroneous in some respect, the taxpayer may still not have overpaid his tax so as to be entitled to a refund. The taxpayer must therefore go further in a refund suit and must affirmatively prove the correct amount of his liability, in order to demonstrate that the government cannot retain the amount claimed under any theory. As this Court stated in *Lewis* v. *Reynolds*, 284 U.S. 281, 283, quoting with approval from the opinion of the court of appeals in that case (48 F.2d 515, 516 (C.A. 10)): "The action to recover on a claim for refund is in the nature of an action for money had and received, and it is incumbent upon the claimant to show that the United States has money which belongs to him." Accord: *United States* v. *Anderson*, 269 U.S. 422, 443; *Wickwire* v. *Reinecke*, 275 U.S. 101, 105; *Botany Mills* v. *United States*, 278 U.S. 282, 289-290; *Reinecke* v. *Spalding*, 280 U.S. 227, 232-233; *Stone* v. *White*, 301 U.S. 532, 533-534.

b. Although this Court has not spoken with respect to the burden of proof in a tax collection suit, it is settled that the presumption of validity that attaches to the Commissioner's tax assessment in a refund suit is similarly applicable in a suit brought by the government to collect on an assessment.[1] In such a collection action, the government is the nominal plaintiff. Nevertheless, it does not bear the burden of proof of an ordinary plaintiff in a civil case. As in a refund suit, the assessment is outstanding in a collection action and is armed with the same presumption of administrative regularity, pursuant to which the governmental officers are deemed to have

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[1] Pursuant to Section 6331 of the Code, Congress has authorized the Internal Revenue Service to levy upon a taxpayer's property in order to satisfy an outstanding assessment. Thus, the collection of taxes does not generally involve judicial action. However, Section 7401 of the Code authorizes the Attorney General, at the request of the Internal Revenue Service, to commence a civil action for the collection or recovery of taxes. See also Section 7403 of the Code. Such a suit would ordinarily be brought to protect the revenue where the six-year period of limitations applicable to levies on the assessment is about to expire. See Section 6502 of the Code. Although a lien based upon a judgment in such a collection action is subject to state statutes of limitations (28 U.S.C. 1962; Rule 69(a), Federal Rules of Civil Procedure), the tax lien itself continues to exist independently of the judgment lien (Section 6322 of the Code), and the judgment itself is not subject to any period of limitations. *United States* v. *Hodes*, 355 F.2d 746 (C.A. 2); *United States* v. *Overman*, 424 F.2d 1142 (C.A. 9). Moreover, in order to avoid multiple litigation, it is the policy of the government to counterclaim in a refund suit where, as here, there is an outstanding unpaid assessment and the refund suit and the counterclaim involve the same facts.

acted reasonably and according to law. See *Bob Jones University* v. *Simon*, 416 U.S. 725, 740. Thus, in a post-assessment collection action brought by the Commissioner, it is equally well established that while the underlying merits of his assessment are potentially subject to judicial scrutiny, the assessment is deemed to be valid. The taxpayer accordingly has the burden of proving in a collection suit that he paid the correct amount of his liability. See, *e.g.*, *United States* v. *Rexach*, 482 F.2d 10, 15-18 (C.A. 1), certiorari denied, 414 U.S. 1039; *Crosby* v. *United States*, 496 F.2d 1384, 1390 (C.A. 5); *Psaty* v. *United States*, 442 F.2d 1154, 1158-1161 (C.A. 3); *Plisco* v. *United States*, 306 F.2d 784, 786 and n. 2 (C.A.D.C.), certiorari denied, 371 U.S. 948.

The rule imposing this stringent burden of proof on a taxpayer challenging an assessment in a tax collection suit is premised upon the nature and effect of a federal tax assessment. Since "taxes are the life-blood of government, and their prompt and certain availability an imperious need," *Bull* v. *United States*, 295 U.S. 247, 259, a unanimous Court pointed out that "[t]he assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt" (*id.* at 260). While the Court made this observation in the context of a refund suit, it has equal force in a collection action where the presumption of correctness attending the assessment relieves the government of the requirement imposed on an ordinary claimant in a

civil case to go forward and prove the amount it is owed. Indeed, the issuance of the assessment does much more than simply relieve the government of the burden of going forward with proof of the correctness of its tax claim. It shifts the entire burden to the taxpayer in any subsequent suit for refund to prove that he paid the correct amount of his liability. As the Court succinctly stated in *Bull*, "the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant, is shifted to the taxpayer" (295 U.S. at 260).

The requirement that the taxpayer in a tax collection proceeding prove that he paid the correct amount of his liability is consistent with the burden of proof rule applicable in the Tax Court. Since this Court has long held that a taxpayer bears the burden of proving the Commissioner's determination of a deficiency erroneous in a pre-assessment Tax Court proceeding (*Lucas* v. *Structural Steel Co.*, 281 U.S. 264, 271; *Welch* v. *Helvering*, 290 U.S. 111, 115), it would be anomalous to impose the burden of proof upon the government in a tax collection proceeding. Such an inversion of the burden of proof would encourage taxpayers to permit delinquent taxes to be assessed and sued for by the government, thereby adding immeasurably to the costs of collection. Moreover, the established burden of proof rule in tax collection proceedings is premised upon sound public policy considerations since it is far more likely that the taxpayer will have greater access to the relevant

information needed to establish the correct amount of liability. Thus, the rule buttresses the requirements of Section 6001 of the Code, which prescribes that "Every person liable for any tax * * * shall keep such records * * * and comply with such rules and regulations as the Secretary or his delegate may from time to time prescribe."

2. Applying the foregoing principles governing tax refund and collection suits to this case, it is beyond question that the courts below erred in upholding respondent's refund claim and in dismissing the government's counterclaim. With respect to his claim for a refund, respondent introduced no evidence that established that his tax liability for the period in question was zero so as to be entitled to a refund of $4,940. If any such evidence existed, it would presumably have been within respondent's ability to present it. Indeed, respondent did not even allege in his complaint (A. 8-9), much less prove, that he was not engaged in accepting wagers subject to the civil wagering tax imposed by Section 4401 of the Code.[5] On this record, therefore, it was impossible for the district court to conclude that the government had erroneously collected $4,940 from respondent. Under the controlling principle of this Court's de-

[5] Moreover, respondent neither alleged nor proved, as required by Section 6419 of the Code, that he had not collected the tax from the persons who placed the wagers on which the tax was imposed. Under these circumstances, the district court was prohibited from upholding respondent's claim for refund. See *Gordon* v. *United States*, 451 F.2d 1354 (C.A. 9), and cases cited therein.

cision in *Lewis* v. *Reynolds*, 284 U.S. 281, respondent had as yet shown no basis upon which he could be granted summary judgment in his refund suit. Similarly, respondent had so far failed to introduce any evidence satisfying his burden of proving that his correct tax liability was zero or any amount less than the assessment. Thus, if any party was entitled to judgment on the government's counterclaim, it was the government rather than respondent. In the absence of any evidence casting doubt on the accuracy of the assessment, its presumptive validity should likewise have been controlling.[6]

[6] The result would be the same in a pre-assessment proceeding for redetermination of a deficiency brought by the taxpayer in the Tax Court. As we have pointed out at p. 19, *supra*, the taxpayer has the burden in the Tax Court of proving that the Commissioner's determination is incorrect. See Rule 142(a) of the Rules of Practice and Procedure of the United States Tax Court (1974); *Welch* v. *Helvering*, *supra*, 290 U.S. at 115; *Lucas* v. *Structural Steel Co.*, *supra*, 281 U.S. at 271. Thus, the taxpayer's burden of proof in the Tax Court cannot be met by showing that the Commissioner's determination was based upon information that may be inadmissible in court or excludable in a criminal proceeding. The Commissioner's determination is presumptively correct and the taxpayer must affirmatively prove that it is erroneous on the merits.

There is accordingly no support for the "exclusionary" remedy imposed by the Tax Court in *Suarez* v. *Commissioner*, 58 T.C. 792. There, the court held that the Commissioner's notice of deficiency carried no presumption of correctness where the deficiency was based upon illegally obtained evidence. The court thereby shifted the burden of going forward to the Commissioner to establish the deficiency with independent untained evidence. Upon the Commissioner's refusal to go forward with such proof, the court entered a decision in the

3. The courts below did not expressly reject the burden of proof principles governing tax refund suits and collection proceedings. However, the radical departure from the requirements of proof in such cases by the decisions below appears to have been predicated upon an extension of the Fourth Amendment exclusionary rule first enunciated by this Court in *Weeks* v. *United States*, 232 U.S. 383. Under that rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. See also *Mapp* v. *Ohio*, 367 U.S. 643. In holding that the assessment "must be suppressed and quashed as being violative of * * * [respondent's] Fourth Amendment rights to be free from unreasonable search and seizure" (Pet. App. 8A), the district court apparently concluded that collection of the tax due under the assessment would abridge respondent's constitutional rights. Thus, with respect to the refund suit, the district court concluded that "[respondent

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taxpayers' favor. *Suarez* v. *Commissioner*, 61 T.C. 841. Indeed, the fact that the Code shifts the burden of proof to the Commissioner in precisely defined situations (see, *e.g.*, Sections 534, 6902(a), 7454) strongly suggests that the Tax Court is not generally empowered to shift the burden to the Commissioner to establish the deficiency.

Moreover, as we argue in Part B, *infra*, pp. 32-35, the application of an exclusionary remedy in the Tax Court in a civil tax case such as *Suarez* would not further the deterrence of unlawful police conduct. As in this case, the illegal search in *Suarez* was carried out by local police officers. The Internal Revenue Service subsequently learned of the taxpayer's arrest from a press report (see 58 T.C. at 798).

was] not required to prove the extent of the refund to which he claims he is entitled" (Pet. App. 7A). In the court's view, it was "sufficient that [respondent] prove that substantially all, if not all, of the evidence upon which the assessment was based was the result of illegally obtained evidence" (*ibid.*). Under similar reasoning, the court dismissed the government's counterclaim because it was based upon the tax assessment that it held to be invalid.

However, nothing in the longstanding line of decisions of this Court and others holding that a tax assessment cannot be set aside unless the taxpayer proves that he paid the correct amount of his liability suggests that the rule should be otherwise if the information upon which the assessment was based might not be competent evidence or admissible in a criminal proceeding against the taxpayer. Indeed, the other appellate decision presenting this question reached precisely the opposite result. In *Compton* v. *United States*, 334 F.2d 212, the Fourth Circuit held, on essentially parallel facts, that a civil wagering tax assessment is not invalid even though based almost entirely upon evidence consisting of gambling paraphernalia and records obtained in an illegal search conducted by local police officers, the fruits of which were made available to agents of the Internal Revenue Service.

As in this case, the illegality of the search in *Compton* arose on account of a defect in the warrant issued to the local police. After reviewing the decisions of this Court holding that the taxpayer bears

the burden of proof in a refund suit, the Fourth Circuit rejected the taxpayer's refund claim, ruling that she had not borne the burden in this case, and observing that the mere fact that the assessment was premised upon the fruits of an illegal search was "not decisive of the issues here" (334 F.2d at 215-216). In *Compton* there was a trial, and the government did not seek to introduce at the trial any of the physical evidence obtained as a result of the illegal search, although it did cross-examine the taxpayer concerning her knowledge of the property obtained in the search. Cf. *Walder* v. *United States*, 347 U.S. 62. Thus, the exclusionary principle invoked by the taxpayer in support of her refund claim was no more applicable in *Compton* than in the instant case.

In our view, the Fourth Circuit in *Compton* correctly held that a federal tax assessment is not rendered invalid in a tax refund or collection suit simply on a showing that it is based on illegally obtained evidence. Moreover, like *Compton*, this case does not involve an application of the conventional exclusionary rule, which only comes into play to bar the use of illegally obtained evidence at trial. Here, the government never even sought to introduce at trial any of respondent's wagering records obtained by the local police at the time of his arrest.[7] Thus, by in-

[7] The government did proffer a certified copy of the assessment (Def. Ex. A, A. 81). The introduction into evidence of a copy of the assessment is the accepted method of establishing the presumptively correct basis of the liability in a tax collection suit. See *Psaty* v. *United States*, 442 F.2d 1154, 1159 (C.A. 3). Here, however, respondent stipulated that the copy of the assessment was admissible without objection (A. 20).

validating the assessment, the courts below utilized a much more radical and unwarranted sanction, one which the *Compton* court expressly rejected and which is not within the traditional scope of remedies for Fourth Amendment violations—summary judgment against the government because its cause of action was deemed tainted.

4. Finally, we submit that this case does not present an appropriate occasion to depart from traditional doctrine by expanding the exclusionary principle from a rule of evidence to a rule of preclusion of "tainted" causes of action. The invalidation of the assessment on the ground that it was based upon illegally obtained evidence is contrary to the broad statutory power given the Commissioner to make tax assessments. Pursuant to Sections 7801(a) and 7802 of the Code, the Secretary of the Treasury, through his delegate the Commissioner of Internal Revenue, is charged with the "administration and enforcement" of the revenue laws. Consistent with this responsibility, the Commissioner is "authorized and required" by Section 6201(a), "to make the inquiries, determinations, and assessments of all taxes * * *" and by Section 6301 to "collect the taxes imposed by the internal revenue laws." Finally, in order that these statutory duties may be discharged effectively, the Internal Revenue Service in Section 7601(a) is empowered "to proceed, from time to time, through each internal revenue district and inquire after and

concerning all persons therein who may be liable to pay any internal revenue tax * * *."

As this Court observed last Term in *United States* v. *Bisceglia*, 420 U.S. 141, 145, 147-148, the Commissioner's statutory power to inquire is a "broad mandate" analogous to the far-reaching inquisitorial powers of a grand jury. See also *United States* v. *Powell*, 379 U.S. 48, 57. Like the grand jury, the proceedings of which are not impeded by the exclusionary rule, *United States* v. *Calandra*, 414 U.S. 338, the Commissioner is obligated to consider information from widely-drawn sources concerning possible noncompliance with the tax laws. Accordingly, the Commissioner is fully empowered to receive and make use of reliable information from third parties even though such information may be incompetent for purposes of admissibility in court or excludable in a criminal proceeding brought against the taxpayer. If he failed to consider such information, he would be remiss in discharging his statutory duties.

Thus, the assessment in this case should not be deemed invalid simply because the Commissioner analyzed material illegally obtained by the Los Angeles police. To the contrary, the validity of the civil assessment would appear to follow *a fortiori* from the unanimous decisions of this Court holding that an indictment is not subject to challenge because the grand jury acted upon inadequate or incompetent evidence, or even on the basis of information obtained in violation of the defendant's privilege against self-incrimination. See, *e.g.*, *Costello* v. *United States*,

350 U.S. 359; *United States* v. *Blue*, 384 U.S. 251, 255, and n. 3. As the Court stated in the latter case, "Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book" (*id.* at 255).

In light of the Court's refusal to dismiss a criminal indictment based upon incompetent or constitutionally excludable evidence, there is no sound basis for the invalidation of the civil assessment by the decision below. Just as there are strong imperatives supporting the grand jury's power to bring a criminal proceeding, there are also compelling policy reasons in favor of insuring that the ordinary civil liabilities imposed by the tax system established by Congress are borne equitably by all persons, including those who may be victims of an illegal search and seizure. Given the present uncertainty over the efficacy of the exclusionary rule in deterring unlawful police conduct, the sanction of defeating the collection of the revenues should be imposed only when it would unquestionably further the primary deterrence objective of the rule.

To be sure, the Court's decisions upholding the validity of an indictment based upon tainted evidence can be distinguished on the ground that such evidence will be excludable at the criminal trial. Un-

like the case of a civil tax assessment which is deemed valid unless the taxpayer proves the correct amount of his liability, the defendant in a criminal case would not be convicted if the indictment is based solely upon illegally obtained evidence. Despite this difference, we submit that there is here no sufficient justification for expanding the traditional scope of the exclusionary rule to something broader than a rule of evidence. Such an expansion could be supported only on the basis that it would meaningfully further the policies underlying the exclusionary rule. As we shall now demonstrate, however, the deterrence theory of the exclusionary rule has no meaningful application to this case, in which the search was conducted by local and not federal authorities and the evidence was not used to punish respondent but simply as a means of collecting the tax for which he would otherwise have been liable. Thus, even if the government had sought to introduce into evidence the wagering records obtained by the local police, the exclusionary rule should not have impeded the enforcement of a federal tax claim that was civil in character.

B. The Exclusionary Rule Should Not Be Applied In This Civil Tax Case

Even if this case were viewed as a conventional application of the exclusionary rule to bar the introduction of tainted evidence (presumably by equating the assessment with evidence of a more traditional sort), there are compelling reasons why this Court should hold that the exclusionary principle is inapplicable to civil cases in these circumstances. First and foremost, the practice of excluding illegally seized evidence is primarily justified by the belief that the cost of such a measure is outweighed by the benefits to be derived in meaningful deterrence of unlawful official conduct. If the marginal deterrent effect of a particular application of the exclusionary principle appears to be slight, as is demonstrably the case when its use in civil litigation is at issue, it ceases to be justified.

Second, this is a case in which such illegality as occurred (and this is indeed a case of borderline misconduct at worst) was committed entirely by local authorities, who are not a party to this case and have no interest in the enforcement of federal civil tax laws. Whatever the merits of the "silver platter" prohibition in criminal cases (see *Elkins* v. *United States*, 364 U.S. 206, 208), it seems unreasonable and unnecessary to deprive innocent parties to civil litigation of relevant evidence because of the misconduct of third parties having no interest in the litigation. Finally, this is not a case in which illegally seized evidence is being used for the purpose of punishing the victim of the search, but rather it is simply being used to require him to comply with civil obligations equally imposed upon all similarly situated persons. In sum, as we discuss more fully below, the judgment of the court of appeals in this case serves neither to further the deterrent purposes of the exclusionary rule nor to protect the judicial process from complicity in distasteful practices.

1. In holding that the Commissioner's tax assessment against respondent "must be suppressed and quashed as being violative of * * * [his] Fourth Amendment rights to be free from unreasonable search and seizure" (Pet. App. 8A), the district court concluded that enforcement of the assessment was barred by the exclusionary rule. That rule originated in *Weeks* v. *United States*, 232 U.S. 383, where the Court held that evidence seized by federal officers in violation of the Fourth Amendment was inadmissible in a federal criminal trial of the victim of the search. In *Wolf* v. *Colorado*, 338 U.S. 25, the Court recognized that the protections of the Fourth Amendment were applicable to state as well as federal action, but it declined to impose the exclusionary rule as a required method of enforcement. Finally, in *Mapp* v. *Ohio*, 367 U.S. 643, the Court overruled *Wolf* and imposed the exclusionary rule on the States, holding that the failure to exclude evidence that state officers had obtained by an unreasonable search and seizure violated the defendant's rights under the due process clause of the Fourteenth Amendment.

As the Court explained in *Elkins* v. *United States*, 364 U.S. 206, the purpose of the rule is to deter unlawful police conduct and not to redress the injury to the privacy of the search victim. "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it" (*id.* at 217).

See also *Linkletter* v. *Walker*, 381 U.S. 618, 637. Accord: *Mapp* v. *Ohio*, *supra*, 367 U.S. at 656; *Tehan* v. *Shott*, 382 U.S. 406, 413; *Terry* v. *Ohio*, 392 U.S. 1, 29.

Accordingly, the Court has never interpreted the exclusionary rule to prohibit all uses of illegally seized evidence in all proceedings and against all persons. Rather, it has restricted the application of the rule to those situations in which the primary objective of the rule to prevent future unlawful police conduct would best be served. "[T]he rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease." Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 389 (1964).

Thus, for example, in *Walder* v. *United States*, 347 U.S. 62, the Court refused to apply the exclusionary rule to bar the use of illegally obtained evidence to impeach the credibility of the defendant. See also *Harris* v. *New York*, 401 U.S. 222. Similarly, in *Jones* v. *United States*, 362 U.S. 257, 261, the Court recognized a standing requirement under which the rule may not be invoked by one who was not the victim of the unlawful search. See also *Alderman* v. *United States*, 394 U.S. 165, 173-175. Most recently, in *United States* v. *Calandra*, 414 U.S. 338, the Court concluded that the exclusionary rule did not apply to grand jury proceedings. As a result, a grand jury witness was held to be required to answer questions even though they were based upon

leads that were the product of an illegal search and seizure.

In each of those cases, the harm resulting from exclusion of evidence was thought to outweigh the possibility that future unlawful police conduct would be deterred. Thus, in deciding whether to extend the exclusionary rule to grand jury proceedings in *Calandra*, the Court balanced the potential harm to the functions of the grand jury against the potential benefits of the rule in such a context. It first concluded that the exclusionary rule would greatly interfere with the effective discharge of the grand jury's duties. On the other hand, the Court regarded an extension of the rule to grand juries as likely to have significant marginal deterrent effect only in the case of police investigation consciously directed toward discovery of evidence solely for use in a grand jury investigation. On this balance of the competing interests, the Court "decline[d] to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury" (414 U.S. at 351-352; footnote omitted).

2. Employing the *Calandra* analysis and balancing the potential harm resulting from exclusion against the possible benefits to be derived from deterring unlawful police conduct, it becomes plain that the exclusionary rule should have no application to civil cases generally and to this civil tax case in particular—even if the government had sought

to introduce copies of respondent's wagering records into evidence.

Here, the sole violation of respondent's Fourth Amendment rights occurred when the Los Angeles police obtained his wagering records pursuant to a defective search warrant. Although that injury has occurred and cannot be undone, future similar police conduct was arguably deterred when respondent's prosecution under the local bookmaking ordinance was dismissed. The subsequent civil tax assessment based upon respondent's wagering records was not a separate violation of his Fourth Amendment rights, and a second application of the exclusionary rule in this case would accomplish nothing more than to relieve respondent of his obligation to pay a tax that other similarly situated persons are required to pay. See *United States* v. *Calandra*, *supra*, 414 U.S. at 354. In light of the widespread uncertainty over the utility of the exclusionary rule in deterring unlawful police conduct in criminal cases,[8] the sanction of defeating the revenues because of the error of a local policeman should be imposed, if ever, only when it is beyond question that an extension of the rule to a civil tax case would further the primary deterrence rationale.

As a general proposition, the extension of the exclusionary rule to civil cases would seem unrelated

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[8] The practical effect of the rule upon unlawful police behavior has been broadly disputed. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 424-427 (appendix to dissenting opinion of Chief Justice Burger); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 755-756 (1970).

to the goal of preventing future unlawful police conduct. As the Court stated in *Calandra*: "[T]he need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a *criminal sanction* on the victim of the search" (414 U.S. at 348; emphasis supplied).

The force of this argument is well illustrated by the facts of this case. Here, the conduct of the Los Angeles police was entirely directed toward the arrest and prosecution of respondent for violation of local gambling laws. Plainly, the local police did not pursue their investigation of respondent in the hope of requiring him to pay the federal wagering tax imposed by Section 4401 of the Code. Moreover, there is nothing in the record that even remotely suggests that the activities of the local police pertaining to respondent were directed by or even known to officials of the Internal Revenue Service or of any other federal agency.[9] The inapplicability of the deterrence theory is especially evident in this case, since it is wholly unrealistic to assume that local police officers would be deterred from illegal searches be-

[9] One of the police officers who conducted the search explained that there was no official police department policy to notify the Internal Revenue Service after a bookmaking arrest. He testified that he made an individual decision to call the Internal Revenue Service "as a matter of police procedure." As he stated, "here's a person that was involved in a crime that had this kind of money, and I thought of Internal Revenue" (A. 42). However, he further testified that he did not think that every member of the police force would have so notified the Internal Revenue Service (*ibid.*).

cause a possible federal civil tax liability would be rendered uncollectable. The connection between the illegal search conducted by the Los Angeles police and the civil federal tax assessment made against respondent is so indirect and attenuated that reliance upon the deterrence rationale would at best involve hazardous speculation. Compare *Elkins* v. *United States*, 364 U.S. 206, 211-214, and cases cited therein. Thus, the federal government should not be barred from making use of evidence obtained by the local police in order to enforce a civil tax claim.

3. Given the Court's refusal to apply the exclusionary rule to cases in which its primary deterrent purpose would not be served, it is hardly surprising that it has never extended the rule to civil cases. The closest it has ever come is in *Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, where the rule was applied to exclude illegally obtained evidence in a forfeiture proceeding against an automobile used to evade a state liquor tax. However, the Court was careful to rest the decision upon the fact that "a forfeiture proceeding is quasi-criminal in character" because "[i]ts object, like a criminal proceeding, is to penalize for the commission of an offense against the law" (380 U.S. at 700).[10] See also *Cleary* v.

[10] In describing the nature of a forfeiture proceeding in *Plymouth Sedan*, the Court referred to *Boyd* v. *United States*, 116 U.S. 616, which held that the Fifth Amendment barred the compulsory production of a person's private papers in a forfeiture proceeding. In *Boyd*, the Court also noted that "suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature,

Bolger, 371 U.S. 392, 403 (concurring opinion of Mr. Justice Goldberg).[11] The Court's recognition that the exclusionary rule is applicable to forfeiture proceedings because of their quasi-criminal character[12] suggests that the exclusionary rule should not apply to impede the enforcement of a civil claim.[13]

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* * * [and] are within the reason of criminal proceedings for all the purposes of the Fourth Amendment * * *" (116 U.S. at 634).

[11] See also *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, upholding the constitutionality of a Puerto Rican statute providing for the seizure and forfeiture of vessels used for unlawful purposes, where the Court stated: "Forfeiture of conveyances that have been used—and may be used again—in violation of the narcotics laws *fosters the purposes served by the underlying criminal statutes*, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable" (416 U.S. at 686-687; emphasis supplied).

[12] The courts of appeals have similarly applied the exclusionary rule to forfeiture proceedings. See, *e.g.*, *Berkowitz* v. *United States*, 340 F.2d 168 (C.A. 1); *United States* v. *Physic*, 175 F.2d 338 (C.A. 2); *United States* v. *Butler*, 156 F.2d 897 (C.A. 10); and *Walker* v. *United States*, 125 F.2d 395 (C.A. 5).

[13] While the Court has held that a claim of the privilege against self-incrimination precluded a criminal conviction for failure to register and pay the wagering and occupational taxes imposed by Sections 4401 and 4411 of the Code, it did not hold that the tax as such was constitutionally impermissible or that the claim of privilege extinguished the civil liability for the tax. See, *e.g.*, *Marchetti* v. *United States*, 390 U.S. 39, 44, 61; *Grosso* v. *United States*, 390 U.S. 62, 69-70, n. 7. See also *United States* v. *Sullivan*, 274 U.S. 259. Similar taxes have been held to be valid revenue-raising measures. See, *e.g.*, *United States* v. *Sanchez*, 340 U.S. 42, 44-45; *Sonzinsky* v. *United States*, 300 U.S. 506, 513-514; *Magnano Co.* v. *Hamilton*, 292 U.S. 40, 47.

While several lower federal courts have extended the application of the exclusionary rule to civil cases in which the government is a party, those decisions have relied upon two legal premises which have been undermined by subsequent decisions of this Court. First, the lower courts have invoked the broad dictum of *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392—that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[14] But such principles as the Fourth Amend-

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[14] See, *e.g.*, *Pizzarello* v. *United States*, 408 F.2d 579 (C.A. 2) (reversed order denying injunction of wagering tax assessment based upon illegal search by Internal Revenue Service); *Knoll Associates, Inc.* v. *Federal Trade Commission*, 397 F.2d 530 (C.A. 7) (documents known to be stolen excluded from evidence in Federal Trade Commission hearing); *Suarez* v. *Commissioner*, 58 T.C. 792 (burden of going forward with evidence to establish deficiency shifted to Commissioner where deficiency based upon evidence illegally obtained by local police). Both *Pizzarello* and *Suarez* heavily relied upon the *Silverthorne* dictum. See 408 F.2d at 585; 58 T.C. at 801-802.

Contra: *Chavez-Raya* v. *Immigration and Naturalization Service*, C.A. 7, No. 74-1482, decided July 16, 1975 (failure to give *Miranda* warnings does not render alien's statement inadmissible in deportation proceeding because of its civil character); *National Labor Relations Board* v. *South Bay Daily Breeze*, 415 F.2d 360 (C.A. 9), certiorari denied, 397 U.S. 915 (stolen documents held admissible in Labor Board proceeding); *United States ex rel. Sperling* v. *Fitzpatrick*, 426 F.2d 1161 (C.A. 2) (exclusionary rule held inapplicable to parole revocation proceeding). See also *Honeycutt* v. *Aetna Insurance Co.*, 510 F.2d 340 (C.A. 7), certiorari denied, No. 74-1306, June 9, 1975 (exclusionary rule not

ment standing and retroactivity doctrines clearly demonstrate that the foregoing statement has not survived in full force. Thus, in *United States* v. *Calandra*, *supra*, 414 U.S. at 352-353, n. 8, the Court stated that it has never interpreted the Fourth Amendment exclusionary remedy to proscribe the use of illegally obtained evidence in all circumstances and concluded that the *Silverthorne* dictum had been "substantially undermined by later cases."

The exclusion of illegally obtained evidence in a civil case has also been justified on the related ground that it was required by "the imperative of judicial integrity" involved in *Elkins* v. *United States*, *supra*, 364 U.S. at 222.[13] Under this view, the introduction of illegally obtained evidence would make the courts "accomplices in the willful disobedience of a Constitution they are sworn to uphold" (*id.* at 223). But the foregoing observations regarding the *Silverthorne* statement are equally apposite to demonstrate that this statement is not absolute in its application. Moreover, in *United States* v. *Peltier*, No. 73-2000, decided June 25, 1975, the Court recognized the limitations upon "the imperative of judicial integrity" as an independent rationale for the application of the exclusionary rule. While the Court acknowledged (slip op. 5) that "the imperative of judicial integrity" played a role in the formulation of

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applicable in civil cases between two private parties to bar introduction of evidence illegally obtained by state and local fire and police officials.

[13] See *Suarez* v. *Commissioner*, *supra*, 58 T.C. at 805.

the exclusionary rule, it further observed (slip op. at 7) that the approach was conceptually parallel to the balancing analysis it applied in *Calandra* in determining whether the deterrence rationale would be served by a particular extension of the exclusionary rule.

After reviewing its exclusionary rule retroactivity decisions, the Court stated in *Peltier* that the "imperative of judicial integrity" would not be offended "if law enforcement officials reasonably believed in good faith that their *conduct* was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution" (slip. op. at 7) (emphasis in original). Thus, the Court concluded that "[i]f the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment" (slip op. at 11). See also *Michigan* v. *Tucker*, 417 U.S. 433, 447.

Applying the foregoing analysis to the facts of this case, it is clear that an extension of the judicially-created exclusionary remedy is particularly unwarranted in this context. Here, the exclusionary rule had its full measure of desired impact on police behavior; the local law enforcement officers, manifestly acting in complete good faith, followed the procedure of "antecedent justification before a magistrate that is central to the Fourth Amendment." *Eaton* v. *Price*,

364 U.S. 263, 272 (separate statement of Brennan, J.). Indeed, had the judge who issued the warrant properly performed his duties, the police almost surely could have supplied the necessary information to complete the showing of probable cause. The constitutional "violation" here was purely technical and was attributable to the judiciary rather than to the police.[16] There having been no flagrant abridgement of respondent's Fourth Amendment rights (see *Brown* v. *Illinois*, No. 73-6650, decided June 26, 1975, (Powell, J., concurring in part, slip op. 5-7)), "the deterrence rationale loses much of its force" (*Michigan* v. *Tucker*, *supra*, 417 U.S. at 447). It is therefore seriously open to question whether the technical defect in the search warrant justified an application of the exclusionary principle even in the local criminal proceeding against respondent.[17] But whatever the merits of the application of the rule in that prior context, there is no sound justification for extending the exclusionary principle to punish the federal tax collector for the error of a local police officer or judge.

[16] Indeed, the difficulty of applying the rule of *Spinelli* v. *United States*, 393 U.S. 410, the basis upon which the search warrant against respondent was held defective, was acknowledged by the district court (A. 47, 64) and is amply illustrated by the proliferation of views in *United States* v. *Harris*, 403 U.S. 573, where the Court's judgment was accompanied by five separate opinions.

[17] To the extent that the "imperative of judicial integrity" is rooted in the notion that it is offensive for courts to permit parties to litigation to further their cause by reliance upon the fruits of their own illegal conduct, no such consideration is present here, since the federal government's hands are unsullied by any illegality.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed and the case remanded to the district court for trial.[18]

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[18] In its pre-trial order, the district court stated that if it rejected respondent's exclusionary rule claim, the following issues of fact remained to be litigated (A. 19-20):

> A. Whether the plaintiff was engaged in bookmaking activities during the period of September 14, 1968 through November 30, 1968?
>
> B. If the plaintiff was engaged in bookmaking activities during the period of September 14, 1968 through November 30, 1968, what were the extent of these activities, and, in particular, what was the gross volume of said activities?
>
> C. If the plaintiff was engaged in bookmaking activities during the period of September 14, 1968 through November 30, 1968, what is his correct federal tax liabilities resulting from said bookmaking activities?

Accordingly, if the judgment of the court of appeals is reversed, we believe that a proper disposition of the case would be a remand to the district court to permit respondent an opportunity to prove that he owed no wagering taxes for the period in question.

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IN THE

Supreme Court of the United States

October Term, 1975
No. 74-958

UNITED STATES OF AMERICA, *et al.*,

Petitioners,

vs.

MAX JANIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1975
No. 74-958

UNITED STATES OF AMERICA, *et al.*,

Petitioners,

vs.

MAX JANIS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT.

Opinions Below.

The findings of fact, conclusions of law and order of the district court (Pet App. 1A-11A) are not officially reported; however, said findings and conclusions are unofficially reported in *Janis v. United States*, 73-1 U.S.T.C. ¶16,083. The memorandum of affirmance of the court of appeals (Pet. App. 12A) is not officially reported.

Jurisdiction.

The judgment of the court of appeals (Pet. App. 13A) was entered July 22, 1974. A petition for rehearing was denied on September 5, 1974 (Pet. App. 14A). By order dated November 27, 1974, Mr. Justice Douglas extended the time for filing a petition for writ of certiorari to and including February 2, 1975 (a

Sunday). The petition for writ of certiorari was filed on February 3, 1975, and was granted on June 9, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

Question Presented.

Whether the exclusionary rule is applicable to a civil tax proceeding wherein the Government's wagering tax assessment is based solely upon evidence seized in violation of the taxpayer's Fourth Amendment rights.

Constitutional Provisions Involved.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides, in pertinent part, that:

> No person shall be . . . compelled in any criminal case to be a witness against himself.

Statement.

On November 26, 1968, the Los Angeles Police Department obtained a warrant directing a search for bookmaking paraphernalia at certain locations and on the persons of Max Janis, respondent, and one Morris Levine. The warrant was issued by a judge of the Municipal Court of the Los Angeles Judicial District, and was based upon an affidavit of an officer of the Los Angeles Police Department, one Leonard Weissman (Pltf. Exs. 1, 2; A. 67-74.)

Officer Weissman's affidavit in support of said search warrant provided in pertinent part as follows:

> Officer Weissman had been a police officer for the past 6½ years. On November 14, 1968, a confidential and reliable informant advised him (Officer Weissman) that bookmaking was being conducted over a telephone number 466-0363, and, in particular, that the respondent was taking bets over this telephone number. The informant further indicated that one Morris Levine was also involved and was participating in the same bookmaking activities, and that Levine sometimes handled bookmaking activities from the respondent's apartment. According to Officer Weissman, the informant (whose identity was not revealed in the affidavit), had never in the past given incorrect information, and information given by said informant had led to the arrest of two other persons on bookmaking charges.
>
> Using departmental facilities to check the telephone number supplied by the informant, Officer Weissman determined that the 466-0363 phone number and an additional phone number were both non-published numbers listed to the respondent. Officer Weissman further stated that, in his opinion, a bookmaker would be using non-published numbers for bookmaking activities.
>
> A check of the criminalistic records maintained by the Los Angeles Police Department revealed that respondent had three prior arrests for bookmaking and one prior arrest for conspiracy for bookmaking, which such arrests resulted in one

conviction for bookmaking. Morris Levine also had one prior conviction for bookmaking.

On November 21, 1968, Officer Weissman was informed by a fellow officer, Sgt. Briggs, that another reliable informant had told Briggs that respondent and Morris Levine were conducting bookmaking activities at one of the locations specified in the warrant. Officer Weissman indicated that this second informant had previously given the police information that resulted in at least two arrests and convictions for bookmaking activities. Based upon his experience as a police officer, and based upon the information supplied by the informants, Officer Weissman was of the opinion that the respondent and Morris Levine were conducting a bookmaking operation (Pltf. Ex. 2; A. 69-74).

Officer Weissman's affidavit in support of the search warrant did not contain any statement of the underlying circumstances from which the informants concluded that the respondent was conducting a bookmaking operation. The affidavit merely concluded that from the nature and extent of the information supplied by the informants, Officer Weissman believed that the informants had and were speaking with personal knowledge (Pltf. Ex. 2; A. 73). The affidavit did not detail the manner in which the informants gathered the information; nor was it alleged that either of the informants personally observed the respondent while engaged in bookmaking operations. The affidavit did not provide a neutral and detached magistrate with information which would dispel the possibility that the informants were merely relying on rumor.

On November 30, 1968, Los Angeles police officers conducted a search pursuant to the warrant issued on the basis of the aforementioned affidavit, and arrested respondent and Levine. Property belonging to the respondent was also seized, including $4,940.00 in cash, wagering records, markers and other documents. Shortly thereafter, Officer Weissman telephoned an Internal Revenue Officer, one Morris Nimovitz, and informed him that respondent had been arrested for bookmaking activities. According to Officer Weissman, it was his policy and the policy of others in the Los Angeles Police Department to notify the Internal Revenue Service whenever a "major-book" was discovered. Notifying the Internal Revenue Service in such a situation was a matter of "police procedure." (A. 42).

Revenue Officer Nimovitz responded to Officer Weissman's telephone call, appeared at police headquarters, and analyzed the materials seized pursuant to the warrant. Based solely on a review of those materials, Revenue Officer Nimovitz determined the gross volume of respondent's gambling activities for the five days immediately preceding his arrest. A Los Angeles police officer further informed Revenue Officer Nimovitz that he had conducted a surveillance of respondent's activities and that such surveillance indicated to him that respondent was engaged in bookmaking activities for a 77-day period from September 14, 1968 through November 30, 1968 (Pet. App. 3A-5A; A. 26-38).

Respondent had not filed any tax returns with respect to his alleged bookmaking activities for the period September 14, 1968 through November 30, 1968. Predicated upon its examination of the evidence obtained by the Los Angeles Police Department pursuant to the

warrant and upon the information pertaining to the alleged 77-day surveillance, the Internal Revenue Service made an assessment against respondent and Morris Levine on December 5, 1968, for wagering taxes under Section 4401 of the Internal Revenue Code of 1954 in the sum of $89,026.09, plus $123.97 of interest. The amount of the assessment was computed by determining respondent's average daily gross proceeds for the 5-day period covered by the material seized pursuant to the warrant, and multiplying the resulting figure by 77, the period of police surveillance of respondent's activities. The Internal Revenue Service would not have been able to compute and issue its assessment without the use of the material seized by the Los Angeles Police Department (A. 51). Additionally, the Internal Revenue Service levied upon and seized respondent's cash in the sum of $4,940.00, which such cash was in the custody of the Los Angeles Police Department as a result of its search pursuant to the subject warrant. The Internal Revenue Service would not have been able to levy upon such cash were it not for the seizure of same by the Los Angeles Police Department (A. 18-19).

Respondent and Morris Levine were prosecuted by local authorities for violation of local gambling laws. On February 18, 1969, they moved to quash the search warrant before the same Municipal Court judge who had originally issued the warrant. They contended that the affidavit in support of the warrant failed to set forth the underlying circumstances necessary to enable a magistrate to independently judge the validity of the information supplied by the informant. The court granted the motion to quash the search warrant and ordered that all items seized pursuant to the warrant be returned to respondent and Morris Levine, save and

except for the $4,940.00 in cash which was levied upon and seized by the Internal Revenue Service while said cash was in the custody of the Los Angeles Police Department (Pet. App. 3A-4A; Pltf. Ex. 4; A. 75-80).

On December 9, 1970, respondent filed his first amended complaint for refund of taxes in the United States District Court for the Central District of California, seeking a refund of the $4,940.00 collected under the levy in partial satisfaction of the $89,026.09 assessment (A. 8-9). Petitioners answered and counterclaimed for $84,210.06, the unpaid balance of the assessment, plus interest (A. 10-12).

In the pretrial conference order which was filed in the district court, the following facts were admitted:

> The Internal Revenue Service predicated its assessment of an excise tax deficiency against respondent solely upon items which had been seized by the Los Angeles Police Department pursuant to the aforementioned warrant and upon conversations had with representatives of the Los Angeles Police Department relating to the contents of the items seized pursuant to the search warrant and the duration of plaintiff's alleged wagering activities (A. 15-18).

The sole basis of the computation of the tax assessment against the respondent was, therefore, the items obtained pursuant to the search warrant and the information furnished to Revenue Officer Nimovitz with respect to the duration of plaintiff's alleged wagering activities (A. 15-18). Without reviewing the material seized pursuant to the warrant, the Internal Revenue Service would have had absolutely no factual basis upon which to establish its assessment (A. 50-51).

After reexamining Officer Weissman's affidavit in support of the search warrant, the district court held that said affidavit was insufficient under the cases of *Spinelli v. United States,* 393 U.S. 410 (1969), and *Aguilar v. Texas,* 378 U.S. 108 (1964) (A. 47). On the basis of the stipulated and admitted facts in the pretrial conference order, the court determined that all of the evidence utilized as the basis of the tax assessment was "obtained directly or indirectly as a result of the search pursuant to the defective search warrant . . .," and, as such, that the assessment was based upon evidence obtained in violation of the respondent's Fourth Amendment rights to be free from unreasonable search and seizure (Pet. App. 7A). The court further concluded that the presumption of validity attaching to the Internal Revenue Service's assessment had been rebutted by the respondent. The respondent had done more than simply allege invalidity or illegality; he had come forward to establish that there were no admissible facts to uphold the assessment, as said assessment was based solely upon illegally obtained evidence. The respondent-taxpayer, therefore, established his burden and overcame the presumption of validity of the assessment (A. 47-65).

Since the respondent-taxpayer had overcome his burden, and since the Internal Revenue Service did not come forward with any evidence other than the illegally obtained evidence, the district court concluded that the Internal Revenue Service could not prevail. As such, the court granted judgment for the respondent on his claim for refund and dismissed that government's counterclaim with prejudice. The United States Court of Appeals for the Ninth Circuit affirmed the decision of the district court (Pet. App. 12A).

Summary of Argument.

This case presents important constitutional questions concerning the application of the exclusionary rule to a civil tax assessment predicated *solely* upon evidence seized in violation of the respondent-taxpayer's Fourth Amendment rights.

The Invalid Warrant.

The search and seizure was made by local law enforcement officers pursuant to a constitutionally defective warrant. The warrant was issued on the basis of an affidavit of a local law enforcement officer, which affidavit stated in relevant part as follows:

> 1. An informant advised the affiant that the respondent was engaged in bookmaking activities, and that bookmaking was being conducted over certain telephone numbers;
>
> 2. The telephone numbers supplied by the informant were non-published numbers listed to the respondent;
>
> 3. Respondent had a prior record for bookmaking activities; and
>
> 4. A fellow law enforcement officer was informed by another informant that respondent was engaged in bookmaking activities.

The affidavit failed to set forth any of the underlying circumstances from which the informants concluded that the respondent was engaged in bookmaking activities. In *Aguilar v. Texas,* 378 U.S. 108 (1964), the Court held that an informant's report is insufficient to establish probable cause unless the affidavit sets forth the underlying circumstances from which the informant concluded that the defendant was engaged in

the illegal activity. The affidavit herein failed to set forth a single underlying fact to enable a magistrate to independently judge the validity of the informants' conclusions.

In *Spinelli v. United States,* 393 U.S. 410 (1969), the Court held that where the informant's report is insufficient under the initial *Aguilar* test, the magistrate should then examine the other allegations in the affidavit and determine whether they sufficiently corroborate the informant's conclusion. The only corroborative statements in the affidavit herein were that the telephone numbers supplied by the informant were listed to the respondent, and that the respondent was a known bookmaker with a prior record for bookmaking activity. The *Spinelli* Court was presented with identical corroborative allegations in the affidavit which it considered. It held that these additional allegations were not sufficient to cure the deficiencies of the affidavit. Therefore, the warrant herein was invalid, and the seizure of bookmaking paraphernalia violated the respondent's Fourth Amendment rights.

Application of the Exclusionary Rule to a Civil Tax Proceeding.

The local law enforcement officers conducted a search pursuant to the defective warrant and arrested respondent. Shortly thereafter, and as a matter of police procedure whenever a "major-book" was discovered, a local law enforcement officer summoned the Internal Revenue Service to review the items seized (A. 42). Based *solely* on the unconstitutionally seized evidence and fruits thereof, the Internal Revenue Service made its assessment for wagering taxes against respondent.

The Fourth Amendment does not distinguish between civil and criminal proceedings. It broadly states that the right of the people to be secure in their persons, houses and effects shall not be violated. The Court has long recognized that if the Amendment is to be preserved, governmental violation thereof cannot be tolerated.

Awareness of the need to deter governmental violation of the Fourth Amendment led to the judicially created exclusionary rule. As this Court has consistently held, the exclusionary rule should be invoked wherever unlawful police conduct violative of the Fourth Amendment will be deterred by its application. (See *Mapp v. Ohio,* 367 U.S. 643 (1961); *Elkins v. United States,* 364 U.S. 206 (1960)).

The record establishes that the Internal Revenue Service's involvement in this case did not come about as a mere afterthought following the seizure and arrest by local authorities. Rather, the Internal Revenue Service was called in as a matter of "police procedure" (A. 42).

It is well known and documented in other cases (see footnote 1, *infra*) that there is close cooperation between the Internal Revenue Service and other law enforcement agencies. This inter-governmental cooperation is a highly commendable enterprise when constitutional rights are not violated in the process. However, if the exclusionary rule is not applied in this case, inter-governmental cooperation will become a vehicle for unconstitutional subterfuge destroying the protections of the Fourth Amendment. Law enforcement officials will in effect be given a license to invade the privacy of a home or place of business knowing that even

though the evidence will be suppressed in a criminal trial, the unconstitutionally seized evidence will constitute the basis of a civil tax assessment. Governmental officials will be able to do indirectly through civil tax proceedings what this Court has clearly held to be impermissible when attempted in the criminal area. These officials will have no incentive to comply with the Fourth Amendment requirements whenever tax producing conduct is suspected. The privacy of the taxpayer's home will be continuously subject to invasion at the whim of such officials. More importantly, if the exclusionary rule is not applied in this case, the Internal Revenue Service itself will be free to send its agents into the homes and businesses of taxpayers, violating the protections of the Fourth Amendment.

The suggestion that the exclusionary rule applies only in the criminal area ignores the underlying rationale for the Court's creation of this protective sanction. Where application of the rule will deter future governmental violation of the Fourth Amendment, the rule should be applied regardless of the label attached to the proceeding.

The Assessment's Presumption of Validity Has Been Rebutted.

Respondent's complaint seeks a refund in the sum of $4,940.00; petitioners have denied liability with respect to said claim for refund, and, additionally, have counterclaimed for $84,210.06. Since the Government is seeking to collect taxes by virtue of its counterclaim, the counterclaim is tantamount to an independnt collection suit instituted by the taxing authority. Thus, within the framework of this litigation, respondent seeks a refund of taxes, while petitioners seek to collect taxes.

It is well settled that the Commissioner's tax assessment is presumptively correct for purposes of both a refund action and a collection suit. However, this presumption is rebuttable and only establishes a *prima facie* case of tax liability. *United States v. Rindskopf,* 105 U.S. 418 (1881); *United States v. Lease,* 346 F.2d 696 (2nd Cir. 1965). In defending against a collection suit, the taxpayer will prevail if he can establish that the assessment is erroneous or invalid. *Bar L Ranch v. Phinney,* 426 F.2d 995 (5th Cir. 1970). The respondent-taxpayer has established unequivocally that the underlying wagering tax assessment was based solely upon illegally obtained evidence (A. 17-18). Where an assessment is predicated solely upon such evidence, the Commissioner's determination is stripped of its presumption of correctness, and, as such, the Commissioner thereafter has the burden of going forward with untainted evidence to establish a tax liability. *Suarez v. Commissioner,* 50 T.C. 792 (1972). Since the Commissioner did not offer any evidence in these proceedings other than the illegally obtained evidence, the respondent-taxpayer must necessarily prevail and obtain judgment in his favor with respect to petitioners' counterclaim.

Petitioners assert that with respect to the refund portion of this litigation, respondent must not only prove that the assessment was invalid, but must also prove the amount of the refund to which he is entitled. Assuming, *arguendo,* that petitioners have correctly described respondent's burden, it is submitted that respondent has in fact established that he is entitled to receive a full refund of all money seized pursuant to the invalid assessment. The record in the court below

reveals that respondent has affirmatively and conclusively proven the following:

1. All evidence utilized by petitioners was illegally obtained.

2. Petitioners' knowledge of the alleged fact that there were bookmaking activities was the direct result of the illegally obtained evidence.

3. Petitioners' knowledge of the alleged fact that respondent was engaged in bookmaking activities was the direct result of the illegally obtained evidence.

4. The tax in question is an excise tax on bookmaking activities.

5. Since there was no admissible evidence whatsoever to establish that respondent was a bookmaker or that respondent was engaged in bookmaking activities, it necessarily follows that there is no wagering tax liability predicated upon such bookmaking activities (A. 17-18, 47-65).

Thus, the respondent-taxpayer has done everything necessary to prove that he is not liable for any wagering taxes whatsoever, and, as such, that he is entitled to a full refund. The record is void of any admissible evidence with respect to respondent being a bookmaker or being engaged in bookmaking activities. Since one cannot be presumed to be a bookmaker, it necessarily follows that respondent has met his burden and is entitled to a full refund.

Potential Forfeiture of Respondent's Fifth Amendment Rights.

Since the assessment is based solely upon illegally obtained evidence, and since such evidence itself suggests criminal violations, requiring the respondent-taxpayer to come forward with additional evidence in order to establish the propriety of his claim for refund violates his Fifth Amendment rights. By forcing the respondent-taxpayer to do more than attack the validity of the underlying assessment, the respondent must choose between asserting his Fifth Amendment rights or placing himself in a position of criminal jeopardy in order to obtain a civil refund. This choice is constitutionally impermissible. See *Spevack v. Klein,* 385 U.S. 511 (1967); *Garrity v. New Jersey,* 385 U.S. 493 (1967); and *Boyd v. United States,* 116 U.S. 616 (1886).

The procedural allocation of the burden of proof in the "normal" refund suit is not constitutionally suspect. However, where the underlying circumstances of the refund action are made criminal by local or federal law, and where the assessment itself is based solely upon illegally obtained evidence, requiring the taxpayer to do more than demonstrate the invalidity of the underlying assessment forces the taxpayer to choose between asserting his Fifth Amendment rights and incurring substantial tax liability to the Government. Such an allocation of the burden of proof would constitute an unconstitutional application thereof.

ARGUMENT.

I

The Government's Wagering Tax Assessment Was Based Solely Upon Evidence Obtained in Violation of the Respondent's Fourth Amendment Rights.[1]

A. Where an Affidavit Is Based Upon Information Supplied by an Informant, the Affidavit Must Set Forth the Underlying Circumstances From Which the Informant Concluded That the Suspect Was Engaged in the Proscribed Activity.

In *Aguilar v. Texas*, 378 U.S. 108, 114-115 (1964), this Court held:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States*, 362 US 257, 4 L Ed 2d 697, 80 S Ct 725, 78 ALR2d 233, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf v. United States*, 376 US 528, 11 L Ed 2d 887, 84 S Ct 825, was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime. . . .'"

---

[1]Petitioners have conceded that "the assessment was based upon the fruits of an illegal search." (Petition for Writ of Certiorari at 7).

In *Spinelli v. United States*, 393 U.S. 410 (1969), this Court observed that the principles set forth in *Aguilar* should be further explicated. In *Aguilar*, a search warrant had issued upon an affidavit of police officers who swore only that they had received reliable information from a credible person and believed that narcotics were being illegally stored on the described premises. The *Aguilar* Court held the affidavit to be inadequate therein for two reasons:

> (1) The application failed to set forth any of the underlying circumstances necessary to enable the magistrate independently to judge the validity of the informant's conclusion that the narcotics were where he said they were; and
>
> (2) The affiant-officers did not attempt to support their claim that their informant was "credible" or his infomation "reliable."

The Court in *Spinelli* referred to these criteria as the "two-pronged *Aguilar* test." *Spinelli, supra*, at 412-413.

In *Spinelli*, the Court held that the informer's report must first be measured against the two-pronged *Aguilar* standards so that its probative value can be assessed. If the affidavit does not pass this initial test under *Aguilar*, the other allegations which corroborate the information contained in the hearsay report should then be considered by the magistrate. *Spinelli, supra*, at 415.

In the case at bar, Officer Weissman's affidavit failed to meet the two-pronged *Aguilar* test. Although the affidavit does in fact state that the informants were reliable and credible in that they had given prior truthful statements, the affidavit is absolutely void of any statements with respect to the underlying circumstances

necessary to enable the magistrate to independently judge the validity of the informants' conclusions.

In *Spinelli,* the affidavit in support of the search warrant stated that the FBI had been informed by a confidential, reliable informant that Spinelli was operating a handbook, accepting wagers and disseminating wager information by means of certain telephone numbers. Commenting on this portion of the affidavit, the Court in *Spinelli* said (at 417):

> ". . . Here, the only facts supplied [by the informant] were that Spinelli was using two specified telephones and that these phones were being used in gambling operations. This meager report could easily have been obtained from an offhand remark heard at a neighborhood bar."

Applying the above-quoted language to the case at bar, it is clear that Officer Weissman's affidavit was similarly defective. The affidavit merely stated that one of the informants indicated that the respondent was taking bets over two specific telephone numbers, and that the other informant indicated that the respondent was engaged in bookmaking activities. The affidavit failed to set forth the underlying circumstances upon which the informants based these conclusions. Therefore, as *Spinelli* clearly holds, the affidavit is insufficient unless other facts contained therein sufficiently support the informants' conclusions.

B. The Corroborative Information in Officer Weissman's Affidavit Is Insufficient With Respect to the Standards Set Forth in Spinelli and Aguilar.

The *Spinelli* Court observed that where the informant's statement is found inadequate under the *Aguilar* test, the other allegations which corroborate the information contained in the affidavit should then be considered. In particular, the Court held as follows (at 415-416):

> ". . . At this stage as well, however, the standards enunciated in *Aguilar* must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar's* tests without independent corroboration? *Aguilar* is relevant at this stage of the inquiry as well because the tests it establishes were designed to implement the long-standing principle that probable cause must be determined by a 'neutral and detached magistrate,' and not by 'the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v. United States,* 333 US 10, 14, 92 L ED 436, 440, 68 S Ct 367 (1948). A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which—even when partially corroborated —is not as reliable as one which passes *Aguilar's* requirements when standing alone."

In *Spinelli,* the affiant attempted to corroborate the informant's tip with the following information: that the

FBI had kept track of Spinelli's movements on five days; that on four of these occasions, Spinelli had been seen crossing a certain bridge and parking his car in a lot used by residents of a certain apartment; that a check with the telephone company revealed that this apartment contained the telephone numbers given by the informant; and that Spinelli was known to federal and local law enforcement agents as a bookmaker, as an associate of bookmakers, and as a gambler.

Commenting on the corroborative information described above, the Court, in *Spinelli,* held (at 418):

> "We conclude, then, that in the present case the informant's tip—even when corroborated to the extent indicated—was not sufficient to provide the basis for a finding of probable cause."

The Court specifically noted that the allegations detailing FBI surveillance of Spinelli and its investigations of telephone records contained no suggestion of criminal conduct when taken by themselves, and that these allegations are not endowed with an aura of suspicion by virtue of the informer's tip. The Court went on to state that the investigative reports cannot take on a sinister color when read in light of common knowledge that bookmaking is often carried on over the telephone and from premises used by others for perfectly normal purposes. With regard to the statement "Spinelli was a known bookmaker," the Court stated that this factual allegation is not itself a sufficient basis for a magistrate's finding of probable cause and that such a factual allegation could not be used to give additional weight to allegations which would otherwise be insufficient. *Spinelli, supra,* at 418-419.

The corroborative statements found in the affidavit of Officer Weissman were, as in *Spinelli,* insufficient to establish probable cause. The sole corroboration which Officer Weissman provided was that a check of one telephone number (non-listed), revealed that it was that of the respondent; that two other numbers were non-listed and in the name of Morris Levine; and that both the respondent and Morris Levine were known bookmakers. The defects and insufficiencies in the affidavit herein are precisely the defects and insufficiencies which were present in the affidavit before the *Spinelli* Court. Thus, it cannot be fairly said that the tips, even in light of these corroborative statements, are as trustworthy as a tip which would pass *Aguilar's* test without independent corroboration. The informants' tips and the corroborative statements failed to provide any underlying circumstances to a magistrate. There were no statements that the informants personally observed the respondent engaged in any bookmaking activities; nor were there any statements that either of the informants placed a bet with respondent.

The fact that Officer Weissman's affidavit contained statements of two informants is not significant, as each such tip was constitutionally defective under the tests set forth in *Aguilar* and *Spinelli.* It is axiomatic that an affidavit based on two informants' tips, each insufficient and uncorroborated with respect to the underlying defects described in *Aguilar* and *Spinelli,* fails to establish probable cause. Thus, the Los Angeles Municipal Court, the United States District Court and the unanimous United States Court of Appeals for the Ninth Circuit each correctly determined that the affidavit herein was insufficient, and, as such, that the warrant based thereon was invalid.

II

The Fourth Amendment Applies to the People of the United States Generally. In Order to Deter Governmental Infringement of the Fundamental Rights Contained Therein, the Exclusionary Rule Should Be Applied to Civil Tax Proceedings.

The Fourth Amendment provides in pertinent part as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. . . ." U.S. Const. amend. IV.

This is the cherished command of the Fourth Amendment. The right of the American people to be left in undisturbed possession of their effects unless valid authority for intruding thereon can be demonstrated on recognized principles of law is basic to our society (*e.g.*, see *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). Thus, the American view of ordered liberty rests on the cornerstone of privacy.

The Fourth Amendment is silent as to the devices by which its commandments are to be observed. However, as the cases set forth below reveal, this Court has long recognized that if the Amendment is to be preserved, governmental violation thereof cannot be tolerated.

The Court's awareness of the need to protect the people within the bounds of the Fourth Amendment by deterring the incentive of governmental officials to violate the Amendment led to a judicially created sanction, the exclusionary rule. An analysis and historical perspective of the development, application and rationale of the exclusionary rule as enunciated by this Court will demonstrate that the application of the exclusionary rule to this case is necessary to protect the respondent's Fourth Amendment rights and to deter future official action which would render the Amendment rhetoric without substance.

The logical starting point is *Weeks v. United States*, 232 U.S. 383 (1914). The Court therein established the rule that in a federal criminal prosecution, evidence obtained by federal agents in violation of a defendant's Fourth Amendment rights must be suppressed. Thus, the Court held (at 391-393):

> "The effect of the Fourth Amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. *This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.* The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights . . .

". . . If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." (Emphasis added).

Subsequent to the decision in *Weeks*, and for approximately the next 35 years, the Court determined that where articles had been illegally seized by local law enforcement officials as opposed to federal officials, the evidence could be introduced by the federal prosecutor because, in the Court's view at that time, "the Fourth Amendment is not directed to individual misconduct of such (state) officials." *Weeks, supra,* at 398; see also *Byars v. United States,* 273 U.S. 28 (1927). In 1949, the Court decided *Wolf v. Colorado,* 338 U.S. 25 (1949) [the ultimate determination of which, *i.e.,* that the exclusionary rule was not constitutionally imposed upon the States through the vehicle of the Due Process Clause of the Fourteenth Amendment, was reversed by this Court, in *Mapp v. Ohio,* 367 U.S. 643 (1961)]. The unanimous Court in *Wolf,* however, determined that the Constitution of the United States, by virtue of the Fourteenth Amendment, prohibited state officials from unreasonable searches and seizures. The Court therein held (at 27-28):

"The security of one's privacy against arbitrary intrusion by the police . . . is . . . implicit in the 'concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."

Then, in *Elkins v. United States,* 364 U.S. 206 (1960), the Court reexamined the dangers created by a rule which allowed the federal prosecutor to use evidence illegally seized by state officials. It pointed out that the practice of state and federal agents cooperating in the investigation and detection of criminal activity was a highly commendable enterprise; however, the admissibility of evidence in a federal trial dependent only upon who had violated the Constitution was undermining the Fourth Amendment itself. Thus, the Court stated((at 215):

". . . For surely no distinction can logically be drawn between evidence obtained in violation of the Fourth Amendment and that obtained in violation of the Fourteenth. The Constitution is flouted equally in either case. To the victim it matters not whether his constitutional right has been invaded be a federal agent or by a state officer. It would be a curiously ambivalent rule that would require the courts of the United States to differentiate between unconstitutionally seized evidence upon so arbitrary a basis."

In defining the basic postulate of the exclusionary rule, the Court in *Elkins* held (at 217-218):

"The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively avail-

able way—by removing the incentive to disregard it. See *Eleuteri v. Richman*, 26 NJ 506, 513, 141 A2d 46, 50. Mr. Justice Jackson summed it up well:

> 'Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.
>
> 'Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty.' "

Petitioners assert that the exclusionary rule is inapplicable to this case because "it seems unreasonable and unnecessary to deprive innocent parties to civil litigation of relevant evidence because of conduct of third parties having no interest in the litigation." (Brief for Petitioners, at 29). In *Elkins*, the Court specifically directed itself to the type of unconscionable subterfuge that would develop if federal officials were allowed to withdraw from direct investigations and tacitly encourage and wait for state officials to violate Fourth

Amendment rights, and thereafter summon the federal agents. In particular, the Court stated (at 221-222):

> "Free and open cooperation between state and federal law enforcement officers is to be commended and encouraged. Yet that kind of cooperation is hardly promoted by a rule that implicitly invites federal officers to withdraw from such association and at least tacitly to encourage state officers in the disregard of constitutionally protected freedom. If, on the other hand, it is understood that the fruit of an unlawful search by the state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered."

The rule of *Elkins* was further expanded in *Preston v. United States*, 376 U.S. 364 (1964), wherein the Court held (at 366):

> "The question whether evidence obtained by state officers and used against a defendant in a federal trial was obtained by unreasonable search and seizure is to be judged as if the search and seizure had been made by federal officers."

In the case at bar, the respondent's papers and effects were seized by local officials in a manner violative of his Fourth Amendment rights. The Internal Revenue Service's involvement in this matter was neither fortuitous nor accidental. Acting in accordance with his customary policy when discovering bookmaking activity of significant amounts, Officer Weissman sum-

moned the Internal Revenue Service to review the evidence which had been seized[2] (A. 42). Based *solely* on the unconstitutionally seized evidence and the fruits of unconstitutional evidence, the Internal Revenue Service made the tax assessment herein (Finding of Fact No. 8; A. 17-18, items "I" and "K").

The rationale of *Elkins* and *Preston* is particularly applicable to the present action. If the exclusionary rule is not applied, law enforcement officials will in effect have a license to violate individuals' Fourth Amendment rights whenever there is suspected activity that has adverse tax consequences to the potential defendant. Thus, officials would be in a position to proceed on the premise that even though the tainted evidence may be inadmissible in a criminal prosecution, never-

[2]Close cooperation between the Internal Revenue Service and law enforcement agencies is not unique to this case. See Silver, *Terminating the Taxpayer's Taxable Year: How the Internal Revenue Service Uses It Against Narcotics Suspects,* 40 J. Tax. 110 (1974). Silver cites an Internal Revenue Service Manual Supplement (dated Nov. 10, 1971) which sets out the procedures of the Internal Revenue Service Narcotics Project used to disrupt narcotics traffic. Silver states (*Id.* at 110):

> "Under current Internal Revenue Service guidelines, whenever a taxpayer is arrested who is suspected of trafficking in narcotics or marijuana, an Internal Revenue Service narcotics squad, headed by a Special Agent and consisting of a Revenue Officer and Revenue Agent, immediately goes into action. Oftentimes, Service personnel will be notified by local law enforcement in advance of an arrest, and in many of the instances the Service team members are present at the time of the arrest."

It is common for law enforcement officers to notify the Internal Revenue Service whenever cash is seized pursuant to a gambling raid, and for assessments to be issued within a very short time thereafter. See affidavit from ten attorneys, *United States v. Marshall,* No. 74-227 (C.D. Cal., May 13, 1974), appeal docketed, No. 2070, 9th Cir., June 7, 1974). [Tarlow, *Criminal Defendants and Abuse of Jeopardy Tax Procedures,* 22 U.C.L.A. L.Rev. 1191, 1192 (1975)].

The fact that law enforcement officers summon the Internal Revenue Service is also evidenced by the following reported cases:

theless it will be admissible as the basis of a subsequent civil tax assessment. Law enforcement officials will be able to accomplish indirectly what this Court has clearly held to be constitutionally impermissible when done directly [*e.g.*, see *Elkins*]. Contrary to the position taken by the petitioners, there will be great incentive on the part of law enforcement officials to make searches and seizures which in the criminal context would be unconstitutional. It is obvious that the imposition of substantial tax liability will have a deterrent effect upon present and future illegal activity, at least equal to the deterrent threat of incarceration, and, consequently, law enforcement officials will have the motivation to make the searches and seizures. Furthermore, if the exclusionary rule is not applied herein, law enforcement officials will have no incentive to comply

> *United States v. Bonaguro,* 294 F.Supp. 750, 751 (E.D. N.Y. 1968) (Secret Service officer testified that when large amounts of currency are seized, the usual policy is to call in the Internal Revenue Service); *Rinieri v. Scanlon,* 254 F.Supp. 469 (S.D. N.Y. 1966) (Federal Narcotics Bureau agents seized cash from defendant and immediately turned the money over to the Internal Revenue Service); *Clark v. Campbell,* 501 F.2d 108 (5th Cir. 1974) (Court noted in footnote 28 at 117 that Internal Revenue Service works in conjunction with the BNDD to assess a deficiency tax in nearly the amount of money or property seized); *Willits v. Richardson,* 497 F.2d 240, 243 (5th Cir. 1974) (taxpayer arrested by Miami police; search of her purse revealed narcotics and approximately $4,400.00 in cash; Internal Revenue Service was immediately notified and deficiency tax was assessed).

The above cited cases, authorities and statements by Officer Weissman demonstrate that the Internal Revenue Service has a close working arrangement with law enforcement agencies. If the exclusionary rule is not applied herein, other enforcement agencies will have incentive to violate taxpayers' Fourth Amendment rights, knowing that the Internal Revenue Service will be able to make use of the constitutional invasions. Therefore, the petitioners' argument that application of the exclusionary rule herein would have only a "minimal and speculative" deterrent effect is without merit.

with such constitutional safeguards as now required by *Spinelli*, *Aguilar* and *Elkins*, among others, at least in the area of criminal activities producing tax liabilities. Carrying this analysis to its logical conclusion, if the exclusionary rule is not applied, law enforcement officials will not be constrained by the present requirement of obtaining a warrant at all, let alone one that sets forth sufficient facts from which a neutral magistrate could find probable cause. More importantly, if the exclusionary rule is not applied in this case, the Internal Revenue Service itself will be free to send its agents into the homes and businesses of taxpayers, violating the protections of the Fourth Amendment.

There is little reason to believe that law enforcement officers in this case or cases involving similar criminal tax producing conduct would comply with the well-established constitutional safeguards which are integrally related with the Fourth Amendment when the same result could be reached indirectly without the many preliminary steps. The Fourth Amendment is presently a vital force only because this Court has supported it with a sanction deterring violation of the Amendment's commands (suppression of illegally seized evidence). If the exclusionary rule is not applied in the case at bar, the mandate of the Fourth Amendment will become mere rhetoric.

In applying the exclusionary rule to the States in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court specfically noted that a federal prosecutor could not use illegally obtained evidence but a state attorney across the street could, although he was supposedly operating under the enforceable prohibitions of the same Amendment. Thus, pre-*Mapp*, a State by admitting evidence unlawfully seized served to encourage disobedience to the Federal Constitution which it was bound to uphold. The *Mapp* Court recognized that it was intolerable to allow one branch of the government to make active use of local law enforcement's unconstitutional activity, and, in connection therewith, stated (at 658):

> "Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness. [Citations]. Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of 'working arrangements' whose results are equally tainted."

The position asserted by the petitioners would serve to encourage the very same disobedience to the Constitution which the Court in *Mapp* sought to redress. In effect, the Government contends that although Mr. Janis has protectable Fourth Amendment rights in a criminal prosecution, when he enters the Tax Court or a United States District Court on a tax-related matter, the basis of which involves alleged criminal conduct, he leaves his Fourth Amendment rights at the doorstep. A healthy federalism with separate criminal and civil proceedings cannot tolerate the illogical dichotomy asserted by the petitioners.

By way of analogy, it has long been recognized by this Court that one may assert his Fifth Amendment rights in any proceeding, criminal or civil, because the danger which the Amendment seeks to shield against can arise in either type of proceeding.[3]

Similarly, the language of the Fourth Amendment itself states that the "people shall be secure . . ." The Court in *Weeks* recognized (at 392):

> "This protection (the Fourth Amendment) reaches all alike, whether accused of crime or not and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." Also cited with approval in *Elkins,* 364 U.S. at 209.

Where application of the exclusionary rule will deter conduct impermissible under the Fourth Amendment, the type of proceeding involved is wholly irrelevant.

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[3]The Court, in *In Re Gault,* 387 U.S. 1, 49 (1967), held with respect to availability of the privilege:

> ". . . [It] does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites. The privilege may, for example, be claimed in a civil or administrative proceeding. . . ."

In *Romanelli v. C.I.R.,* 466 F.2d 872 (7th Cir. 1972), a taxpayer was interrogated in violation of his Fifth Amendment rights for failure to provide him with his *Miranda* warnings. The issue before the court therein was whether the taxpayer's statements so obtained could be used in a civil tax proceeding to establish the Government's case concerning the tax liability. In holding that the evidence could not be used, the court stated (at 879):

> ". . . [W]e prefer the policy judgment that exclusion from establishing the Government's civil case is an appropriate and desirable deterrent . . . To permit them [the government agents] so proceeding, to infringe upon Romanelli's constiutional protection against self-incrimination, to an extent that the right to use his statements to establish a criminal charge was forfeited, but to award the advantage of using his statements in establishing a civil liability seems unwholesome and an abuse of power."

The evil that the exclusionary rule seeks to deter can arise in both civil and criminal proceedings. The petitioners have characterized the position taken by the respondent, the United States District Court and a unanimous Ninth Circuit Court of Appeals as an "unwarranted extension of the exclusionary rule." On the contrary, based upon the rationale expressed in every opinion by this Court, applying the exclusionary rule in this case is a natural and necessary application. The rule is a judicially created sanction designed to protect Fourth Amendment rights by deterring the incentive to violate those rights. Whether the incentive be in the form of criminal penalties or civil tax assessments matters not.

The decision of *Camara v. Municipal Court of the City and County of San Francisco,* 387 U.S. 523 (1967), holding that a search warrant must be obtained before inspecting homes for compliance with local ordinances, establishes that the Fourth Amendment mandate that the people shall be free from unreasonable searches is not limited to the criminal area. Admittedly, most cases involving unreasonable searches arise in the criminal as opposed to the civil context. This, however, in no way diminishes the scope or application of the Fourth Amendment where an unconstitutional search takes place and the fruit thereof is the sole basis of the governmental civil action. Where the effect of applying the exclusionary rule will deter unconstitutional conduct, the rule should be applied regardless of the label of the particular proceeding.

Although the issue of the applicability of the exclusionary rule to a civil tax proceeding is a case of first impression before this Court, lower courts, including

state, federal and the Tax Court, have consistently applied the rule to civil proceedings. In *Berkowitz v. United States,* 340 F.2d 168 (1st Cir. 1965), the taxpayer was criminally prosecuted for violating a federal wagering tax statute. A motion to suppress evidence unlawfully obtained from the taxpayer in violation of his Fourth Amendment rights was sustained by the trial court. Thereafter, the Government filed a civil action in the form of a libel for the forfeiture of the money which had been seized by the Government at the time the taxpayer's Fourth Amendment rights had been violated. In answer to the libel, the taxpayer maintained that the money was his and that his Fourth Amendment rights had been violated. In upholding the taxpayer's position, the *Berkowitz* court held (at 170-171):

> ". . . What emerges from these resounding declarations [*Weeks, Mapp,* etc.] is the rule that even where there is present the very great interests of society first, in adjudging the conduct of a defendant charged with the most reprehensible crimes, and second, in disabling him if guilty from continuing as a menace to the peaceful existence of the rest of us, nonetheless, unconstitutionally seized evidence may not be used to convict him. The safety of our society depends more upon the preservation of fundamental liberties than upon the punishment of a person whose offense we can prove only through subverting those liberties . . .
>
> ". . . What the Government is seeking in the case at bar is to put its interest in forfeiting some money which was used to commit a crime ahead of the public interest in keeping the action of Government agents within Constitutional boundaries."

The court in *Berkowitz* went on to hold that if the seizure of the taxpayer's money was in violation of his Fourth Amendment rights, then the Government should not be allowed to benefit from the constitutional infringements.

In the instant action, the Government seeks to put the interests of tax assessment and collection ahead of constitutional rights. The assessment herein was predicated solely on the basis of unconstitutionally obtained evidence, without which the Government would have been unable to make its assessment (A. 17, 18, 51). It is highly anomolous to suggest that although known and suspected criminals may assert their Fourth Amendment rights where there have been constitutional invasions, civil litigants may not do likewise.

In *United States v. Blank,* 261 F.Supp. 180 (N.D. Ohio 1966), the court was presented with the issue of the applicability of the exclusionary rule to a civil tax proceeding. Internal Revenue agents had searched the taxpayer's premises in violation of his Fourth Amendment rights. In the criminal proceeding brought against him, a motion to suppress the evidence was granted. Subsequent thereto, the taxpayer was informed that the Internal Revenue Service was assessing a substantial tax against him predicated upon the materials seized. The position taken by the Government was that since the assessment proceeding was civil, the taxpayer had no Fourth Amendment rights and the exclusionary rule was inapplicable. The court responded to this contention as follows (at 182):

> "We must first approach the exclusionary rule under attack here by the Government. The purpose of the exclusionary rule is to put teeth into the Fourth Amendment; the rule is the only effi-

cacious sanction whereby courts may deter the unbridled plunder of private property by law enforcement officials. As stated by the Supreme Court in *Mapp v. Ohio,* 367 U.S. 643, 656, 81 S.Ct. 1684, 1692, 6 L.Ed.2d 1081 (1961), to withhold the sanction of excluding illegally seized evidence 'is to grant the right but in reality to withhold its privilege and enjoyment.' The necessity of withholding evidence which law enforcement officials secure by illegal means 'is to deter —to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' *Elkins v. United States,* 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960). . .

"For reasons too clear, we cannot agree with the Government. Where, as here, there is a correlative civil action open to the Government which imposes a penalty upon the citizen commensurate with the criminal sanctions to which an accused, victimized by an illegal search would be exposed, then we see no distinguishable difference between the two forms of punishment which excuses the Government from complying with constitutional mandates when prosecuting their action in a civil form. *Were this not the case, all suspected violators of revenue laws would be subject to the precise evil at which the Fourth Amendment is directed—the unreasonable disruption of the privacy of the home—no matter how slim or unfounded might be suspicion of their illegal activity.* If there is no constitutional check on the 'investigative' efforts of federal administrative officials prosecuting civil claims, and there exist forfeiture and deficiency proceedings, civil in form, which inflict an onerous monetary penalty upon an accused which approximates the visitations of the criminal code, there is no rule of reasonableness. *Searches can be instigated at the capricious whim of any administrative official or enforcement agent rather than as a result of the informed deliberation of 'a neutral and detached magistrate.' Giordenello v. United States,* 357 U.S. 480, 486, 78 S.Ct. 1245, 2 L. Ed.2d 1503 (1958). If these speculative suspicions prove to be accidentally accurate, and the invasion force discovers evidence of activity which is both offensive to the criminal code and also indicative of evasion of taxes or tariffs accountable in a civil proceeding, the Government need not bother with criminal proceedings and may avoid the exclusionary rule embodied in Rule 41 of the Federal Rules of Civil Procedure. If the Government's assessment of the boundaries of the Fourth Amendment is correct, then it may take the accused down a civil avenue to impose its penalties while keeping itself free from the impinging requirement of reasonableness which the Fourth Amendment imposes." (Emphasis added).

The fact the federal agents in *Blank* were the ones who violated the taxpayer's Fourth Amendment rights is not determinative of the issue herein. As set forth above, *Elkins* and *Preston* clearly laid to rest the idea that federal officials could tacitly await Fourth Amendment violations by local officials and then benefit from those violations.

The court in *Blank* further observed that although the tax assessment is civil in nature, where it is based on alleged criminal activity, it involves the very de-

termination present in the criminal proceedings. The court held (at 184):

> "The success of the Government's attempted deficiency assessment for non-payment of federal excise taxes requires 'the determination that the criminal law has been violated,' to wit, that the movant has been in the business of accepting wagers without registering with the Internal Revenue, without submitting his daily records to their scrutiny, and without paying the excise tax. Consequently, we do not think that federal officials may elect to proceed in an administrative forum and 'by this device take from the proceeding its criminal aspect and deprive' the accused of the privileges which the Constitution purports to secure for him. We hold that the contemplated imposition of taxes and penalties upon the movant is an action 'for penalties incurred by the commission of offenses against the law' and that the accused is entitled to all that the Fourth Amendment guarantees to him."

In *Suarez v. Commissioner*, 50 T.C. 792 (1972), the United States Tax Court was presented with the precise issue which is before this Court. Due to the similarity of the facts in *Suarez* to the case at bar, and due to the court's elaborate and carefully reasoned analysis therein, a detailed discussion of *Suarez* is relevant.

Local law enforcement officers conducted a search of Mr. Suarez' business premises. During the search, the local officers seized his daily records, $2,650.00 in cash, medical instruments, promissory notes, jewelry, car titles and other disputed records. *Suarez*, at 798. As a result of the search and seizure, Suarez was

charged with conspiracy to perform an abortion and attempting to produce the miscarriage of a woman.

According to the stipulated facts, the Internal Revenue Service learned of the raid on Suarez' business premises through the news media and subsequently arranged a meeting with local law enforcement officials. As in the present case before this Court, the parties in *Suarez* stipulated that the evidence seized in the raid was the sole basis of the proposed assessment.

Subsequent to Suarez' state criminal conviction, the United States District Court granted his writ of habeas corpus on the ground that the evidence obtained in the raid was the product of an unlawful search, and, as such, should have been suppressed at trial. Thereafter, the Tax Court heard Suarez' motion to strike the affirmative allegations of the Government's amended answer and to suppress the evidence. These motions were made on stipulated facts that the proposed assessment was based solely on the evidence unconstitutionally seized during the raid.

The Tax Court granted both the taxpayer's motion to strike the Government's affirmative allegations which were based on the unconstitutionally seized evidence and the motion to suppress all of the evidence so seized. In doing so, the court reviewed the history and rationale of the exclusionary rule, discussing the decisions set forth in *Weeks*, *Mapp* and *Elkins*. The Tax Court stated (at 802):

> "Thus far the high court [sic] has not faced the exact issue presented herein. But it has repeatedly stated that the rule's purpose is to deter unconstitutional conduct, and its prior opinion, as well as decisions by other Federal courts, clearly

delineate the path we should follow. Thus in *Weeks v. United States, supra,* the Court, in commenting on the scope of protection afforded by the Fourth Amendment, stated (232 U.S. at 392):

> 'This protection reaches all alike, *whether accused of crime or not,* and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws . . .'

"And in *Camara v. Municipal Court, supra,* which involves a warrantless search pursuant to the San Francisco Housing Code, the Court said (356 U.S. at 530):

> '[W]e cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.' It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.' "

The Tax Court in *Suarez* observed that the Second Circuit Court of Appeals was faced with the question of the Fourth Amendment's applicability in a civil tax case in *Pizzarello v. United States,* 408 F.2d 579 (2nd Cir. 1969). *Pizzarello* involved a taxpayer's action seeking to enjoin the levy of a jeopardy assessment for unpaid wagering taxes on money illegally seized by the Government. In reversing the lower court's order denying the injunction, the court said (at 586):

> "This case, however, while civil in nature is not between private parties and there are no analogous independent deterrents to, or remedies against, government violations of the Fourth

> Amendment. The prohibition against unreasonable searches and seizures is directed at governmental action. Absent an exclusionary rule, the Government would be free to undertake unreasonable searches and seizures in all civil cases without the possibility of unfavorable consequences. In such a situation, while the matter has not been settled by Supreme Court decision, it seems clear, even under a view of the law most favorable to the Government, that evidence so obtained would be excluded. Because Pizzarello's tax assessment was based in substantial part, if not completely, on illegally procured evidence, the assessment is invalid."[4]

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[4]The following cases have also applied the exclusionary rule to civil proceedings:

Knoll Associates, Inc. v. F.T.C., 397 F.2d 530 (7th Cir. 1968 (stolen documents could not be used by Government in F.T.C. proceeding); *Powell v. Zuckert,* 366 F.2d 634 (D.C. Cir., 1966) (illegally obtained evidence could not be used in civilian discharge proceeding); *Rogers v. United States,* 97 F.2d 691 (1st Cir. 1938) (civil tax judgment based on constitutionally tainted evidence is invalid); *Laprease v. Raymours Furniture Company,* 315 F.Supp. 716 (N.D. N.Y. 1970) (sheriff in replevin action could not seize chattel without intervention of judicial officer, because to do so would violate the Fourth Amendment); *State of Iowa v. Union Asphalt & Roadoils, Inc.,* 281 F.Supp. 391 (S.D. Iowa 1968) affirmed sub. nom. *Standard Oil Company v. State of Iowa,* 408 F.2d 1171 (8th Cir. 1969) (government officials seized material in violation of Fourth Amendment and were prohibited from using that evidence in a civil anti-trust action); *United States v. Stonehill,* 274 F.Supp. 420 (S.D. Cal. 1967), affirmed 405 F.2d 738 (9th Cir. 1968) (failed to apply exclusionary rule to tax case *only* due to fact that the underlying illegal search was conducted by Mexican officials, and, therefore, there would be no deterrent effect); *Lassoff v. Gray,* 207 F.Supp. 843 (W.D. Ky. 1962) (assessment of tax based solely on illegally obtained evidence indicating that taxpayer was engaged in bookmaking was invalid and illegal); *Anderson v. Richardson,* 354 F.Supp. 363 (S.D. Fla. 1973) (government enjoined from attaching taxpayer's assets based on jeopardy

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The court in *Suarez*, in holding that the protective rule of the Fourth Amendment which excludes evidence illegally obtained is applicable to a civil tax case, stated (at 805-806):

> "We are not unmindful of the competing considerations involved in applying the protection of the Fourth Amendment. See Amsterdam, 'Search and Seizure and Section 2255: A Comment,' 112U. of Pa. L. Rev. 378, 388-389 (1964). But, the language of the Fourth Amendment itself admits of no distinction between searches and seizures in the context of a criminal case and those made in the context of a civil case. Indeed, it speaks in terms of the proscribed conduct without any apparent regard to the motivation for such conduct or the use of the fruits thereof . . .
>
> "The costs to society of applying the exclusionary rule in civil tax cases are substantially less than in the criminal area where the rule is well established. Surely the lesser objective of civil tax collection should not be accorded preferential treatment over the greater objective of convicting the guilty criminal. Moreover, we cannot ignore the additional factor that the integrity of the judicial process is also at stake. See *Mapp v. Ohio, supra,* 367 U.S. at 659 (1961); *Elkins v. United States, supra,* 364 U.S. at 222 (1960).
>
> "In view of the foregoing, we conclude that any competing considerations based upon the need for effective enforcement of civil tax liabilities (compare *Elkins v. United States, supra,* 364 U.S. at

assessment where assessment was based on unconstitutionally seized evidence); also see the annotation, "Admissibility in Civil Case, of Evidence Obtained by Unlawful Search and Seizure," 5 A.L.R. 3d 670, 678-683.

> 222) must give way to the higher goal of protection of the individual and the necessity for preserving confidence in, rather than encouraging contempt for, the processes of government . . .
>
> "We hold that, as a matter of law, the protective rule of the Fourth Amendment which excludes evidence illegally obtained is applicable in a civil tax case."

Petitioners cite *United States v. Calandra,* 414 U.S. 338 (1974), as authority for their position that the exclusionary rule in inapplicable to this case. In *Calandra,* this Court was presented with the issue of whether a grand jury can bring an indictment based upon unconstitutionally seized evidence. In determining that the grand jury could use such evidence, this Court noted that the grand jury is not an adversary hearing in which liability is determined, but rather it is an *ex parte* investigation to determine whether probable cause exists for instituting another proceeding in which the defendant has full constitutional safeguards. *Calandra,* at 344. Thus, the Court stated (at 351):

> "The incentive to disregard the requirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim."

Unlike *Calandra,* the case at bar involves an adversary proceeding in which liability is determined. Unlike *Calandra,* the respondent herein does not have the opportunity to assert his constitutional arguments in a subsequent proceeding. Unlike *Calandra,* applying the exclusionary rule here will have a significant deterrent

effect upon future unconstitutional violations of the Fourth Amendment. The rationale of this Court in *Calandra*, therefore, does not support the Government, but, on the contrary, constitutes authority for the position asserted by respondent herein.

Unless the exclusionary rule is applied in this case, there will be no counterveiling force to deter the incentive to violate the Fourth Amendment whenever supposed criminal conduct gives rise to tax liability. Governmental officials will in effect be given a license to conduct illegal searches and seizures in the hope that such searches will result in the imposition of a tax against one whose constitutional rights have been violated.

III

A Civil Tax Assessment Is Only Presumptively Correct. Since Respondent Has Established That the Assessment Was Based Solely Upon Illegally Obtained Evidence, the Assessment Has Lost Its Presumption of Validity.

It is well settled that the Commissioner's assessment establishes a *prima facie* case of tax liability; *if* not impeached, this presumption of validity will justify recovery for the Internal Revenue Service. *United States v. Rindskopf*, 105 U.S. 418 (1881); *United States v. Lease*, 346 F.2d 696 (2nd Cir. 1965). In order to defeat the assessment's presumption of validity, the taxpayer must establish that the assessment was erroneous or incorrect. *United States v. Lease, supra.*

In the case at bar, respondent has demonstrated that the petitioners' assessment is not entitled to the presumption of validity. In the pretrial conference order, the parties stipulated that the assessment against the

respondent was based solely upon items seized by the Los Angeles Police Department and upon conversations had with representatives of the Los Angeles Police Department relating to the contents of the items seized (A. 17-18). Therefore, the sole basis of the assessment was evidence seized in violation of the taxpayer's Fourth Amendment rights. The district court did not depart from the well recognized rule that initially the assessment is presumptively valid. Rather, the court found, based upon stipulated facts, that where an assessment is predicated completely on unlawfully seized evidence, the assessment is stripped of its presumption, and, as such, there is no further presumption for the taxpayer to rebut (A. 47-65).

The respondent did not merely allege that the assessment was invalid or illegal; through the procedural device of the pretrial conference order, he has gone forward to establish that the assessment was based solely on unconstitutionally obtained evidence. Since the only evidence submitted by the Government throughout the course of these proceedings was this very same unconstitutionally obtained evidence, the respondent-taxpayer overcame the presumption of correctness which attaches to the underlying assessment. Thus, the respondent-taxpayer rebutted the presumption of correctness, thereby shifting the burden of going forward to the Government.

In *Suarez, supra*, the Tax Court was faced with the issues of the presumptive validity of a proposed assessment based completely upon unlawfully obtained evidence, and the placement of the respective burdens of proof and of going forward. The court therein observed that it was not confronted with a determination

predicated upon evidence inadmissible under the usual rules of evidence, *e.g.*, hearsay. On the contrary, the court in *Suarez* emphasized that the proposed assessment rested solely on evidence obtained in violation of the taxpayer's Fourth Amendment rights. The court held (at 814):

> "Where infringement of constitutional rights are involved, we are convinced that the determination in a statutory notice should be carefully scrutinized and that some sanctions should be imposed to discourage the Commissioner's use and reliance on constitutionally inadmissible evidence."

With regard to the allocation of both the burden of proof and the burden of going forward, the *Suarez* court held (at 814-815):

> ". . . [I]n the realm of the criminal law, where the exclusionary rule was born, suppression of tainted evidence serves as an effective disincentive to its use by the Government because the Government has the burden of proof. Clearly, such disincentive does not exist in a civil tax case if the sole action taken is to suppress such evidence and the burden of proof and of going forward with the evidence remains on the taxpayer. We, therefore, conclude that in addition to suppression of the tainted evidence here, we must take further action . . .
>
> "We believe that the respondent [Commissioner] has the duty in the case at bar not only to cleanse the evidence but also, if he wishes to be sustained in his determination herein, to present evidence to support it which is free of unconstitutional taint.
>
> "We therefore conclude and hold that the determination before us, based entirely on constitutionally inadmissible evidence, carries no presumption of correctness. Because the presumption of correctness has disappeared, the respondent [Commissioner] now has the burden of going forward with the proof to establish the existence of a deficiency with independent evidence, separate and apart from the tainted evidence."

The respondent herein filed a complaint seeking a refund of the $4,940.00 seized by the local police and levied upon by the Government; the petitioners denied liability on the claim for refund, and, counterclaimed for $84,210.66. Since the Government is seeking to establish the validity of the assessment in its counterclaim, the counterclaim is tantamount to an independent collection suit instituted by the taxing authority. The procedural burden placed upon a taxpayer defending against such a collection suit has been discussed in detail in *Bar L Ranch v. Phinney*, 426 F.2d 995 (5th Cir. 1970), wherein the court held (at 998-999):

> "We have found only one Court of Appeals case, United States v. Lease, 2 Cir. 1965, 346 F.2d 696, which discusses the burden of proof on a taxpayer who challenges the correctness of a tax assessment as a defense in a collection suit. The Second Circuit concluded that the taxpayer has the easier burden of proof to show only that the Government computations are arbitrary. The court said the burden is then upon the Government to show whether any deficiency exists, and, if so, in what amount; it is not encumbent upon the taxpayer to prove the correctness of the item concerned. Accord, *Spivack v. United States*, S.D. N.Y. 1966, 254 F.Supp. 517, 522, aff'd 370 F.2d

612, cert. denied, 387 U.S. 908, 87 S.Ct. 1690, 18 L.ed.2d 625 (which, like the instant case, involved a counterclaim by the Government).

"Requiring taxpayers in collection suits to meet the more rigorous burden of proof demanded in refund cases would not be warranted by the rationale of those cases:

> 'Since the action for refund of taxes is in the nature of a common law action for money had and received and is governed by equitable principles, the burden of proof is on the taxpayer to prove not only that the determination of the tax is wrong, but to produce evidence from which another and proper determination could be made.' *David v. Phinney*, 5 Cir. 1965, 350 F.2d 371, 376, quoting 10 Mertens Law of Federal Income Taxation, Section 58A.35, pp. 98-99.
>
> "We therefore agree with the conclusion of *United States v. Lease, supra*, that a taxpayer defending a collection suit need only show the Government's assessment was arbitrary and that the burden is then on the Government to show whether any deficiency exists and, if so, in what amount."

In the case at bar, the respondent-taxpayer established that the assessment was based solely upon unconstitutionally obtained evidence. The district court, therefore, correctly determined that the assessment lost its presumption of validity. At no point in the proceedings below did the petitioners offer any untainted evidence which would be admissible at trial. As the court held in *Suarez, supra*, it was incumbent upon the Commissioner to go forward with untainted evidence to establish

his position once the assessment lost its presumption of validity. Since the petitioners did not offer any untainted evidence, the assessment was fatally defective.

Subsequent to the unconstitutional seizure of evidence (including the $4,940.00 in cash belonging to the respondent), petitioners assessed a wagering tax in the sum of $89,026.09 against the respondent. Pursuant to this assessment and the power accorded to him by Section 6331 of the Code, the Commissioner levied upon the $4,940.00 in cash. The seizure of this cash is the basis of the respondent's refund suit.

Petitioners contend that the district court erred in finding for respondent on the refund portion of this action, arguing that with respect to his claim for refund of $4,940.00, respondent must prove not only that the determination was incorrect, but in addition, he must produce evidence from which another determination can be made. In the ordinary tax refund case, this is a correct description of the allocation of the burden. However, unlike most tax refund actions, here the respondent was placed in the position of having to file a claim for refund as a direct result of the violations of his Fourth Amendment rights. Since respondent demonstrated that the underlying assessment was based completely upon unconstitutionally seized evidence, and since the petitioners did not offer any additional untainted evidence, it follows *a priori* that respondent should be entitled to a full refund of all money seized pursuant to the invalid assessment. In effect, the respondent-taxpayer has demonstrated the following:

1. All evidence utilized by the petitioners was illegally obtained:

2. Petitioners determined that the respondent-taxpayer was engaged in bookmaking activities

solely as a result of the illegally obtained evidence;

3. The tax in question is an excise tax on bookmaking activities; and

4. Since there was no admissible evidence whatsoever to establish bookmaking activities, it necessarily follows that there is no wagering tax liability predicated upon bookmaking activities, and, as such, the respondent-taxpayer is entitled to prevail in these proceedings.

Thus, the respondent-taxpayer has done everything necessary to prove that he is not liable for any wagering taxes, save and except that he has not physically testified with respect to his alleged participation in bookmaking activities. Since there was no admissible evidence in the record of such underlying activities, and since one cannot be presumed to be a bookmaker, it necessariiy follows that the respondent-taxpayer has met his burden and is entitled to a full refund.

Petitioners cite *Compton v. United States*, 334 F.2d 212 (4th Cir. 1964), in support of their position that a civil wagering tax assessment is not invalid even though based *almost entirely* upon illegally obtained evidence (Brief for Petitioners at 23). However, unlike *Compton*, the assessment herein was based *solely* upon illegally obtained evidence. Thus, the Fourth Circuit was not presented with the precise issue which is before this Court, *i.e.*, whether a wagering tax assessment may be based *solely* upon illegally obtained evidence. In *Compton*, there was apparently a sufficient amount of untainted evidence upon which the Government could establish gambling activities. This untainted evidence in and of itself required the taxpayer to come forth in order to ascertain her proper tax liability. In the case at

bar, the respondent-taxpayer should not be required to come forth with any additional evidence as there is no admissible evidence in the record whatsoever with respect to his alleged bookmaking activities, and, as such, there is no underlying basis for a wagering tax assessment.

IV

Where the Underlying Conduct Giving Rise to the Assessment Is Alleged Criminal Activity, a Taxpayer Should Not Be Required to Forfeit His Fifth Amendment Rights in Order to Obtain a Tax Refund.

On the narrow and limited facts of the case at bar, (assessment based solely on unconstitutionally seized evidence, which evidence itself suggests criminal violations) requiring the respondent-taxpayer to come forth with additional evidence in order to establish the propriety of his claim for refund would violate his Fifth Amendment rights. The alleged conduct giving rise to the assessment was bookmaking, which is made criminal by the following statutes: West's Cal. Penal Code, Section 337a (West 1970); 18 U.S.C. Section 1955. By forcing the respondent-taxpayer to do more than attack the validity of the underlying assessment, the taxpayer must choose between asserting his Fifth Amendment rights or placing himself in a position of criminal jeopardy in order to obtain a civil refund. This Hobson's choice is a direct result of the normal procedural burden allocation in the refund action. However, where a civil tax assessment is based solely on unconstitutionally seized evidence, and where the underlying activity is alleged criminal conduct, the Court should not impose a procedural burden which would require the taxpayer to forfeit his Fifth Amendment rights.

In *Boyd v. United States,* 116 U.S 616 (1886), a taxpayer's property was seized for violation of federal revenue laws, and a civil forfeiture action was brought against the property. The statute therein offered the taxpayer an election between producing a certain incriminating document or forfeiting the goods in the civil proceeding. The Court held that this choice was violative of the taxpayer's Fifth Amendment rights. (*Boyd* at 631-635).

Similarly, in *Spevack v. Klein,* 385 U.S. 511 (1967), the Court quoted from *Malloy v. Hogan,* 378 U.S. at 8, with approval as follows (at 514):

> ". . . the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."

In defining the word "penalty" used by the *Malloy* Court, the court in *Spevack* held (at 515):

> "In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in *Griffin v. California,* 380 U.S. 609, 14 L.ed.2d 106, 85 S.Ct. 229, the imposition of any sanction which makes assertion of the Fifth Amendment 'costly.' "

And in *Garrity v. New Jersey,* 385 U.S. 493 (1967), the Court held that the petitioner could not be forced to make a choice between self-incrimination and job forfeiture. The Court therein stated (at 497):

> "The choice given the petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent."

If the respondent-taxpayer must prove not only that the assessment is invalid, but must also come forth with additional evidence, such a requirement would result in an unconstitutional application of the burden of proof. The reason therefor is that the respondent-taxpayer would be placed in a position of incriminating himself, thereby losing the protections afforded by the Fifth Amendment. The respondent would not be able to establish his claim for refund without making himself vulnerable to federal or state prosecution for illegal gambling activity.

Respondent reiterates that the procedural allocation of the burden of proof in the "normal" refund suit (one which is not based on illegal activity) is not constitutionally suspect. However, when, as in this case, the underlying conduct giving rise to the refund action is made criminal by local or federal law, requiring the taxpayer to do more than demonstrate the invalidity of the underlying assessment forces the taxpayer to choose between asserting his Fifth Amendment right and incurring substantial liability to the Government. Such a choice is not constitutionally permissible.

Conclusion.

For the reasons set forth above, the exclusionary rule must be applied to this case in order to deter future violations of the Fourth Amendment. The respondent, therefore, respectfully urges this Honorable Court to affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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